

# ***Harmelin v. Michigan*: The Most Recent Casualty in the Supreme Court's Struggle to Develop a Standard for Eighth Amendment Proportionality Review**

## **I. INTRODUCTION**

"Of all the wars the United States has fought since 1945, not one has enjoyed the popularity of the War on Drugs."<sup>1</sup> Reportedly, Americans fear the spread of illegal drugs more than unemployment or the deficit.<sup>2</sup> Consequently, Americans indicate a willingness to pay higher taxes for drug enforcement at a time when there are few other governmental services for which the same sentiment is expressed.<sup>3</sup> Since 1980, there has been an overwhelming increase in the enforcement of drug laws.<sup>4</sup> The total federal drug budget has increased eleven-fold.<sup>5</sup> Drug arrests have become the "biggest prison filler in the land."<sup>6</sup>

As drug cases flood the federal courts, the punishments meted out continue to escalate. Federal judges no longer have much discretion in sentencing; "even the most small-potatoes marijuana crime—possession without intent to sell—carries a mandatory minimum."<sup>7</sup> Federal parole no longer exists.<sup>8</sup> When you are convicted under federal law, you are virtually guaranteed to remain in prison until the full mandatory sentence is served.<sup>9</sup>

The federal laws, however, are not unique in their harshness. Many states have tough drug laws which carry mandatory minimum standards.<sup>10</sup> For example, "Michigan's mandatory minimum statute, known as the '650 Lifer' law, is one of the oldest and still the toughest in the nation."<sup>11</sup> As the Supreme Court noted:

Mich. Comp. Laws Ann. § 333.7403(2)(a)(i) (Supp. 1990–1991) provides a mandatory sentence of life in prison for possession of 650 grams or more of

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<sup>1</sup> Dan Baum, *The Drug War on Civil Liberties*, 254 THE NATION 886, 886 (1992).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 887.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* note 246 and accompanying text.

<sup>11</sup> Mike Sager, *The Case of Gary Fannon*, ROLLING STONE MAGAZINE, Sept. 3, 1992, at 27, 30.

"any mixture containing [a schedule 2] controlled substance"; § 333.7214(a)(iv) defines cocaine as a schedule 2 controlled substance. Section 791.234(4) provides eligibility for parole after 10 years in prison, *except* for those convicted of either first-degree murder or "a major controlled substance offense"; § 791.233b[1](b) defines "major controlled substance offense" as, *inter alia*, a violation of § 333.7403.<sup>12</sup>

Over 160 individuals have been convicted and sentenced to life in prison with no possibility of parole under this Michigan law, resulting in appeals challenging the constitutionality of the law.<sup>13</sup> One such appeal was heard by the United States Supreme Court in *Harmelin v. Michigan*.<sup>14</sup>

Ronald Harmelin was stopped by the police for a traffic violation.<sup>15</sup> During the stop, the officer decided to conduct a pat-down search of Harmelin who revealed that he was carrying a concealed weapon by permit and appeared to be nervous.<sup>16</sup> In doing so, some marijuana was found and Harmelin was placed under arrest.<sup>17</sup> A further search of Harmelin yielded assorted pills and capsules, three vials and ten "baggies" of white powder, drug paraphernalia, and a telephone-beeper.<sup>18</sup> In a later search of Harmelin's impounded car, the police discovered a satchel containing a shaving-kit bag in the trunk which contained \$2900 in cash and two bags of white powder subsequently determined to be 672.5 grams of cocaine.<sup>19</sup> A fingerprint expert testified that Harmelin's fingerprints were found on books located inside the satchel and next to the bags of cocaine.<sup>20</sup>

After a bench trial, Harmelin was convicted of possession of 650 or more grams of a mixture containing cocaine, and possession of a firearm during the commission of a felony. He was sentenced on April 30, 1987 to a mandatory life term of imprisonment for the cocaine conviction and a mandatory two-year term of imprisonment for the felony-firearm conviction. Harmelin appealed the sentence, but it was affirmed by the Michigan Court of Appeals.<sup>21</sup> The United States Supreme Court granted certiorari.<sup>22</sup>

In his appeal to the Supreme Court, Harmelin claimed that his cocaine conviction sentence violated the Eighth Amendment for two reasons: first,

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<sup>12</sup> *Harmelin v. Michigan*, 111 S. Ct. 2680, 2684 n.1 (1991).

<sup>13</sup> Sager, *supra* note 11, at 30.

<sup>14</sup> 111 S. Ct. 2680 (1991).

<sup>15</sup> *People v. Harmelin*, 440 N.W.2d 75, 77 (Mich. Ct. App. 1989).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 78.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 76-77.

<sup>22</sup> *Harmelin v. Michigan*, 495 U.S. 956 (1990).

because it was “significantly disproportionate” to the crime he committed;<sup>23</sup> second, because the sentencing judge was statutorily required to impose it, without taking into account the circumstances of the crime or the characteristics of the criminal.<sup>24</sup>

The United States Supreme Court affirmed the sentence in a five-to-four decision that is illustrative of the continuing debate over whether the Eighth Amendment encompasses a proportionality guarantee when applied to the length of a prison sentence. This Comment questions the Court’s holding that the “imposition of a mandatory sentence of life in prison without possibility of parole for drug possession, without consideration of mitigating factors such as the fact that [Harmelin] had no prior felony conviction, did not constitute cruel and unusual punishment”<sup>25</sup> under the Eighth Amendment. Part II will briefly examine the traditional interpretation of the Eighth Amendment in criminal law. Part III will discuss the case history of proportionality as a constitutional doctrine, notably its inconsistent treatment in prior Supreme Court decisions. Part IV will examine the *Harmelin v. Michigan* decision and the specific analysis provided by the various Justices. Part V will analyze the decision using the analytical approach set forth in *Solem v. Helm*.<sup>26</sup> Part VI will review the important factors that the Supreme Court failed to consider in deciding *Harmelin*. Finally, Part VII will discuss the lower federal courts’ application of proportionality review before and after *Harmelin*, the Michigan Supreme Court’s subsequent decision declaring the same statute unconstitutional under its state constitution, and the overall future of proportionality review as it applies to the length of prison sentences.

## II. THE EIGHTH AMENDMENT

The Eighth Amendment<sup>27</sup> ban on “cruel and unusual punishments” has been traced back to the popular outrage against abuses attributed to the infamous Lord Chief Justice Jeffreys of the King’s Bench during the Stuart reign of James II.<sup>28</sup> The English Declaration of Rights provision was prompted

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<sup>23</sup> *Harmelin v. Michigan*, 111 S. Ct. 2680, 2684 (1991).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2680.

<sup>26</sup> 463 U.S. 277 (1983).

<sup>27</sup> “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The “cruel and unusual” punishments clause has been applied to the states through the Fourteenth Amendment Due Process Clause. See *Robinson v. California*, 370 U.S. 660 (1962).

<sup>28</sup> Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1910); see, e.g., 4 W. BLACKSTONE, COMMENTARIES 372; L. SCHWOERER, DECLARATION OF RIGHTS, 1689, at 92–93 (1981); SOURCES OF OUR LIBERTIES 222–23 (R. Perry & J. Cooper

by the proceedings known as the "Bloody Assizes" following the Duke of Monmouth's abortive rebellion in 1685.<sup>29</sup> The vicious punishments for treason decreed in the Bloody Assizes (drawing and quartering, burning of women felons, beheading, and disemboweling among other punishments.) that were "common" in that period and specifically authorized by law<sup>30</sup> have led legal scholars to conclude that the Eighth Amendment was included only to outlaw certain "modes" of punishment deemed to be "cruel and unusual."<sup>31</sup>

Not all commentators view the focus on modes of punishment as a limit on the scope of the Eighth Amendment. On the contrary, this narrow interpretation is not the prevailing interpretation expounded in Supreme Court precedent. A review of Supreme Court decisions finds the Eighth Amendment applied more broadly to limit application of the death penalty and to enforce basic human rights.<sup>32</sup> Its application to proportionality in the length of criminal sentences will be discussed in Part III. This Part will briefly discuss the other aforementioned contexts in which the Eighth Amendment has been applied.

In 1972, the Supreme Court expanded its Eighth Amendment jurisprudence when it decided three cases consolidated on appeal as *Furman v. Georgia*.<sup>33</sup> The decision in *Furman* effectively struck down all death penalty statutes. Three justices concluded that the arbitrary imposition of the death penalty constituted "cruel and unusual punishment" in violation of the Eighth Amendment.<sup>34</sup> Justice White noted that there was "no meaningful basis for distinguishing the few cases in which [the death penalty was] imposed from the many cases in which it [was] not."<sup>35</sup> However, the Supreme Court later

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eds., 1959); see also 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896 (1833).

<sup>29</sup> See *supra* note 28.

<sup>30</sup> See BLACKSTONE, *supra* note 28, at 70; Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 855-56 (1969).

<sup>31</sup> See *Harmelin v. Michigan*, 111 S. Ct. 2680, 2691 (1991). In Part I(C) of Justice Scalia's opinion in which he is joined by Chief Justice Rehnquist, Justice Scalia asserts that the Eighth Amendment has this narrow interpretation. *Id.* at 2691 (citing *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989)). "[T]he Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.* at 2691-92 (citations omitted).

<sup>32</sup> See *infra* notes 33-49, 76-164 and accompanying text.

<sup>33</sup> 408 U.S. 238 (1972) (5-4 decision).

<sup>34</sup> *Id.* at 253 (Douglas, J., concurring); *Id.* at 310 (Stewart, J., concurring); *Id.* at 313 (White, J., concurring). Justices Brennan and Marshall also voted to reverse the sentences because they viewed the death penalty as per se unconstitutional in today's world. *Id.* at 257-306 (Brennan, J., concurring); *Id.* at 314-74 (Marshall, J., concurring).

<sup>35</sup> *Id.* at 313 (White, J., concurring).

affirmed three death sentences in *Gregg v. Georgia*,<sup>36</sup> *Jurek v. Texas*,<sup>37</sup> and *Proffitt v. Florida*.<sup>38</sup> In these decisions the Court established the basic requirements of: “(1) a bifurcated proceeding where the penalty was considered separately from the guilt of the defendant; (2) specific standards that narrowed the class of death-eligible defendants; (3) the consideration of all relevant information, especially mitigating circumstances, in the penalty phase; and (4) meaningful appellate review.”<sup>39</sup> All of which provide the foundation for current death penalty schemes and the doctrine of “individualized capital-sentencing.” The Court has held that a “capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that punishment is ‘appropriate’—whether or not the sentence is ‘grossly disproportionate.’”<sup>40</sup> Individualized sentencing is a key concept in Eighth Amendment jurisprudence, and Harmelin argued in his appeal that it should be extended beyond the death penalty context. Part IV will address the Court’s rejection of this position.

The Eighth Amendment proportionality principle has also been applied to limit application of the death penalty when the sentence was deemed to be “grossly disproportionate” to the crime committed. In *Coker v. Georgia*,<sup>41</sup> the Supreme Court held that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”<sup>42</sup> The Court applied similar reasoning in *Enmund v. Florida*<sup>43</sup> to strike down a capital sentence imposed for a felony murder conviction. The defendant, who was an accomplice to the felony which resulted in a death, did “not himself kill, attempt to kill, or intend that killing take place . . . .”<sup>44</sup> As some commentators

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<sup>36</sup> 428 U.S. 153 (1976).

<sup>37</sup> 428 U.S. 262 (1976).

<sup>38</sup> 428 U.S. 242 (1976).

<sup>39</sup> Linda E. Carter, *A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L.J. 195, 197 (1991) (footnotes omitted).

<sup>40</sup> Harmelin v. Michigan, 111 S. Ct. 2680, 2701 (1991) (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)); see also *Sumner v. Scuman*, 483 U.S. 66, 73 (1987) (creating the “individualized capital-sentencing doctrine”); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>41</sup> 433 U.S. 584 (1977).

<sup>42</sup> *Id.* at 592.

<sup>43</sup> 458 U.S. 782 (1982) (5-4 decision).

<sup>44</sup> *Id.* at 797; cf. *Tison v. Arizona*, 481 U.S. 137 (1987) (upholding the defendant’s death penalty conviction, though only an accomplice to the murders, because of his significant participation in the planning and execution of the crimes).

have noted, the "twin themes of human dignity and judicial role weave throughout this line of cases."<sup>45</sup>

The standards-of-decency approach is firmly entrenched in our constitutional theory and most recently, the Eighth Amendment has been applied outside the capital sentence context to prisoners' rights cases. In *Hudson v. McMillian*,<sup>46</sup> the Supreme Court extended the Eighth Amendment's protection against cruel and unusual punishment to cover a prisoner who was beaten by guards but suffered no "significant injury."<sup>47</sup> And in *McCarthy v. Madigan*,<sup>48</sup> the Court held that a prisoner need not exhaust administrative appeals before bringing a federal suit claiming that prison officials violated his Eighth Amendment rights by neglecting his medical and psychiatric needs.<sup>49</sup>

The foregoing examples highlight the Supreme Court's interpretation of the Eighth Amendment. The Court has utilized proportionality review to prohibit the imposition of the death penalty arbitrarily, that is, without specific statutory guidelines. It has utilized proportionality review to limit the application of the death penalty and has prohibited the imposition of a death sentence for certain crimes. It has also utilized the Eighth Amendment's underlying notion of human decency to enforce the constitutional rights of prisoners. This Part by no means provides an exhaustive examination of the interpretation of the Eighth Amendment. For the purposes of this Comment, however, it provides the necessary background to analyze the *Harmelin* decision, which focuses on another aspect of significance in criminal law—the Supreme Court's application of the Eighth Amendment proportionality principle to non-capital sentences.

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<sup>45</sup> Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 32 (1985).

<sup>46</sup> 112 S. Ct. 995 (1992).

<sup>47</sup> *Id.* at 997. The Louisiana prisoner was beaten, while handcuffed and shackled, by two guards at Angola State Penitentiary while a supervisor watched the beating and cautioned the two guards "not to have too much fun." *Id.* Although, according to the Court, the prisoner had no "significant injury," suffering only bruises, facial swelling, loosened teeth and cracked dental plate, Justice O'Connor stated that "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 1000. She added, "[t]his is true whether or not significant injury is evident." *Id.*

<sup>48</sup> 112 S. Ct. 1081 (1992).

<sup>49</sup> *Id.* at 1088.

### III. CHALLENGES TO THE LENGTH OF CRIMINAL SENTENCES

#### A. *Historical Background*

The requirement that punishment be proportional to the seriousness of the offense has traditionally been a salient principle of punishment.<sup>50</sup> The principle of proportionality was familiar to English law at the time the Declaration of Rights<sup>51</sup> was drafted.<sup>52</sup> The Magna Charta<sup>53</sup> provided that "[a] free man shall not be fined for a small offence, except in proportion to the measure of the offence; and for a great offence he shall be fined in proportion to the magnitude of the offence, saving his freehold . . . ."<sup>54</sup> Even today, proportionality is manifested explicitly in the statement of purpose of various criminal codes.<sup>55</sup> The Model Penal Code includes among the purposes of the definition of crimes the aim "to differentiate on reasonable grounds between serious and minor offenses,"<sup>56</sup> and it includes among the purposes of sentencing provisions the aim "to safeguard offenders against excessive, disproportionate or arbitrary punishment."<sup>57</sup> In simple and concise terms, the proportionality doctrine prohibits punishment more severe than that deserved by the criminal for the

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<sup>50</sup> See Baker & Baldwin, *supra* note 45. "The requirement that the punishment be proportionate to the crime may be traced backward to the Magna Charta in 1215 and forward through the English common law, the English Bill of Rights in 1689, and beyond." *Id.* at 27; see also *Hodges v. Humkin*, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("[I]mprisonment ought always to be according to the quality of the offence.").

<sup>51</sup> The Declaration of Rights is the antecedent of the United States Constitutional text. This document was promulgated in February 1689, and was enacted into law as the Bill of Rights. 1 Wm. & Mary, Sess. 2, ch. 2, in December 1689; See SCHWOERER, *supra* note 28, at 279, 295-98 (1981); SOURCES OF OUR LIBERTIES 222-23 (R. Perry & J. Cooper eds.; 1959).

<sup>52</sup> See Baker & Baldwin, *supra* note 45, at 35.

<sup>53</sup> "The great charter. The name of a charter (or constitutional enactment) granted by King John of England to the barons, at Runnymede, on June 15, 1215, and afterwards, with some alterations, confirmed in Parliament by Henry III and Edward I. This charter is justly regarded as the foundation of English constitutional liberty." BLACK'S LAW DICTIONARY 951-52 (6th ed. 1990).

<sup>54</sup> The Magna Charta, Art. 20, reprinted in SOURCES OF OUR LIBERTIES 222-23 (R. Perry & J. Cooper eds., 1959).

<sup>55</sup> See, e.g., CAL. PENAL CODE § 1170 (West Supp. 1993) (noting that punishment through imprisonment is "best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances"); N.Y. PENAL LAW § 1.05 (McKinney 1987) ("To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor.").

<sup>56</sup> Model Penal Code § 1.02(1)(e) (1962).

<sup>57</sup> *Id.* at § 102(2)(c).

harm caused and the moral blameworthiness exhibited. The criminal laws make clear that nonviolent crimes are less serious than crimes marked by violence or the threat of violence.<sup>58</sup> Commentators agree that "when the question of the *quantum* of punishment for such [criminal] conduct is raised, we should defer to principles which make relative moral wickedness of different offenders a partial determinant of the severity of punishment."<sup>59</sup> This basic notion of an individual determination of the degree of guilt will be important when considering the issue of the appropriateness of mandatory sentencing, which does not require any individual determinations concerning the defendant's prior history and propensity toward criminal activity to determine the sentence to be imposed.

### B. *Theories of Punishment*

Although a lengthy discussion of the justification of punishment is beyond the scope of this Comment, it is worth mentioning that the theories of punishment also contribute to the framing of sentencing structures. Some theories are concerned with the particular offender, while others focus more on the nature of the offense and the welfare of the general public. For example, if the goal is deterrence, it is believed "the punishment should be adjusted in such a manner to each particular offence," that potential offenders are deterred from committing the act.<sup>60</sup> In addition, some sentences are framed under one theory, while others may be justified under several. The most widely accepted theories of punishment are retribution, deterrence, prevention, restraint, rehabilitation, and education.

Retribution is the oldest theory of punishment. It has gained wide acceptance and commands considerable respect from the general public.<sup>61</sup> Under this theory "punishment (the infliction of suffering) is imposed by society on criminals in order to obtain revenge because it is only fitting and just that one who has caused harm to others should himself suffer for it."<sup>62</sup> Alternatively, some retribution theorists believe that the offender should "receive commensurate punishment in order to restore the peace of mind and

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<sup>58</sup> See Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 237 (1974).

<sup>59</sup> H.L.A. HART, LAW, LIBERTY AND MORALITY 37 (1963).

<sup>60</sup> JEREMY BENTHAM, *Principles of Penal Law* pt. II, bk. I, ch. VI, in 1 J. BENTHAM'S WORKS 401 (J. Bowring ed.; 1843).

<sup>61</sup> WAYNE R. LAFAYE & AUSTIN W. SCOTT, CRIMINAL LAW § 1.5, at 26 (2d ed. 1986). "Retribution was long the theory least accepted by theorists, it 'is suddenly being seen by thinkers of all political persuasions as perhaps the strongest ground, after all, upon which to base a system of punishment.'" *Id.* (quoting Martin Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 784).

<sup>62</sup> *Id.* § 1.5, at 25–26.



repress the criminal tendencies of others”<sup>63</sup> and that “retributive punishment is needed to maintain respect for the law and to suppress acts of private vengeance.”<sup>64</sup>

Under the deterrence theory, the threat of punishment (actually carried out against specific offenders for the crimes they have committed) is supposed to deter potential offenders in the general community from committing future crimes.<sup>65</sup> Deterrence is sometimes referred to as general prevention or general deterrence.<sup>66</sup> The extent to which criminal punishment actually has a deterrent effect on the general public has not been substantiated by any conclusive empirical research.<sup>67</sup> The education theory also focuses more on the effect on

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<sup>63</sup> *Id.* § 1.5, at 26 (citing J. GIBBS, CRIME, PUNISHMENT AND DETERRENCE 82–83 (1975) Note, 78 COLUM. L. REV. 1249, 1257–59 (1978)). See D.J. Galligan, *The Return to Retribution in Penal Theory*, CRIME, PROOF AND PUNISHMENT 144–71 (C.F.H. Tapper ed., 1981) (asserting retribution theory’s resurgence of popularity); Steinberger, *Hegel on Crime and Punishment*, 77 AM. POL. SCI. REV. 858 (1983) (noting retributive justifications of punishment). For critical studies of retribution, see A.C. EWING, THE MORALITY OF PUNISHMENT (1929) and NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE (1980). See generally CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS AND JUSTIFICATIONS (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) [hereinafter CONTEMPORARY PUNISHMENT]; A. GOODHART, ENGLISH LAW AND THE MORAL LAW 92–93 (1953).

<sup>64</sup> LAFAVE & SCOTT, *supra* note 61, § 1.5, at 25.

<sup>65</sup> See FRANKLIN ZIMRING, PERSPECTIVES ON DETERRENCE 32–97 (1971). The theory of simple deterrence is that threats can reduce crime because people who are tempted to pursue particular criminal conduct will refrain from committing the offense because the risk of an unpleasant result, *i.e.*, the communicated threat of punishment, offsets the pleasure that might be obtained from going through with the criminal act. See also CONTEMPORARY PUNISHMENT, *supra* note 63, at 93 (“Only when the threat has failed in a particular case do we apply punishment. When we do so, we say that in order to keep the threat credible we must punish those who break the law.”).

<sup>66</sup> Deterrence theorists distinguish between the effect of punishment as a general deterrent from it as a special deterrent—that is, the infliction of punishment on convicted defendants leaves them less likely to engage in the crime. See J. ANDENAES, PUNISHMENT AND DETERRENCE 175 (1974); David Nagin, *General Deterrence: A Review of the Empirical Evidence*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 95 (A. Blumstein, J. Cohen & D. Nagin eds., 1978). This theory is asserted by the Michigan Legislature and the Respondent in *Harmelin* as justifying the harsh mandatory sentence. Thus, the legislature and the Supreme Court rely on a theory which is not supported by any actual conclusive empirical research as to its effectiveness. Therefore, it is more likely that the sentence serves as merely a form of retribution.

<sup>67</sup> LAFAVE & SCOTT, *supra* note 61, § 1.5, at 25. It is difficult to assess the effectiveness of fear of punishment as a deterrent because it is but one of several forces that restrain people from violating the law. Attacks on deterrence theories have concentrated on the empirical claim, without evidentiary support, that criminals and would-be criminals are dissuaded from crime by their assessment of the risks of conviction and the unpleasantness

the general public. Criminal punishment is supposed to educate the public to distinguish between good and bad conduct, by the publicity surrounding the trial, conviction, and punishment of criminals.<sup>68</sup>

The prevention theory, also called intimidation, aims to deter the criminal from committing future crimes. Punishment is supposed to serve as an unpleasant experience that the criminal will not want to endure again. The validity of this theory is sometimes questioned due to the high recidivism rates of those who have been punished.<sup>69</sup>

Restraint, also expressed as incapacitation, has received increased attention in recent years as a crime control strategy.<sup>70</sup> "The notion here . . . is that society may protect itself from persons deemed to be dangerous because of their past criminal conduct by isolating these persons from society."<sup>71</sup> The theory, however, depends on selective identification of those criminals who present a danger of continuing criminality, and critics question whether this identification can be accurately accomplished.<sup>72</sup>

There is, lastly, rehabilitation, also called correction or reformation. Rehabilitation is aimed at giving the criminal "appropriate treatment, in order to rehabilitate him and return him to society so reformed that he will not desire or need to commit further crimes."<sup>73</sup> Unfortunately, not many postconviction actions toward offenders or prison environments are truly rehabilitative.<sup>74</sup> Because no satisfactory results have been shown in practice, some have

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of imprisonment. Individuals react differently to the threat of punishment depending on various factors including "social class, age, intelligence and moral training." *Id.* "The magnitude of the threatened punishment is clearly a factor, *but perhaps not as important a consideration as the probability of discovery and punishment.*" *Id.* (emphasis added). Deterrence theories may not have been given a fair chance because reaction to past failures has been to increase penalties rather than increasing the *certainty* of punishment. *Id.* at 25 n.31. See ANDENAES, *supra* note 66, at 9 (stating that due to the lack of a measurement of its effectiveness, there is disagreement over the importance of general prevention); PHILIP BEAN, PUNISHMENT 29-44 (1981); see also ZIMRING, *supra* note 65; Nagin, *supra* note 66, at 95-139 (assessing research on deterrence).

<sup>68</sup> LAFAVE & SCOTT, *supra* note 61, § 1.5, at 25.

<sup>69</sup> See *id.* § 1.5, at 23.

<sup>70</sup> See Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH, vol. 5, pp. 1-84 (M. Tonry and N. Morris eds., 1983).

<sup>71</sup> LAFAVE & SCOTT, *supra* note 61, § 1.5, at 24.

<sup>72</sup> *Id.*, see also Cohen, *supra* note 70.

<sup>73</sup> LAFAVE & SCOTT, *supra* note 61, § 1.5, at 24.

<sup>74</sup> *Id.* § 1.5, at 24 nn.21-23.

questioned the theory's reliability and in recent years its influence has declined.<sup>75</sup>

Legislatures usually include as an objective one of these theories in order to justify a particular sentence as punishment for a specific offense and courts, therefore, consider these theories when deciding the proportionality issue. Legislators and individuals in general have shown the greatest disposition to err on the excessive side in meting out punishment to achieve these objectives. Thus, there is a great need for precautions against disproportionate sentencing.

### C. *United States Supreme Court Precedent*

The Supreme Court has held that the Eighth Amendment forbids grossly disproportionate sentencing, but has been cautious in applying the principle. As with many other constitutional principles, the Court has had some difficulty, and gone through some transition, in developing an analytical approach to proportionality cases. Thus, a background history emphasizing the leading Supreme Court decisions on proportionality begins this inquiry.

#### 1. *Early Cases*

In 1910, the Supreme Court for the first time overturned a criminal sentence applying the Eighth Amendment proportionality principle. In *Weems v. United States*,<sup>76</sup> the defendant was convicted of falsifying a public document and was sentenced to fifteen years of *cadena temporal* ("temporary chain"), a punishment remnant of the Spanish Civil Code that included imprisonment,

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<sup>75</sup> See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL—PENAL POLICY AND SOCIAL POLICY* (1981); see also MICHAEL S. MOORE, *LAW AND PSYCHIATRY* 234–35 (1984).

<sup>76</sup> 217 U.S. 349 (1910). The Court interpreted the cruel and unusual punishment clause of the Philippine Bill of Rights. PHIL. CONST. ART. III § 1(19). The clause came verbatim from the Eighth Amendment and Congress intended the same meaning. 217 U.S. at 367. Thus the analysis was the same as under the Eighth and Fourteenth Amendments. See *Solem v. Helm*, 463 U.S. 277, 289 (1983). *Weems*, however, was not the first Supreme Court case to discuss the proportionality doctrine. The doctrine may be traced back to Justice Field's 1892 dissenting opinion in *O'Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting). The defendant in *O'Neil*, a legitimate New York dealer, was convicted of 307 separate counts of mail-order sales of liquor in Vermont, a dry state. His cumulative fine plus costs was \$6,638.72 and he was committed until payment; a failure to meet a payment deadline would result in a 19,914 day (55 years) sentence to hard labor. *Id.* at 323–24. The majority dismissed the writ for want of jurisdiction and because the Eighth Amendment did not apply to the states. *Id.* at 331–32. In his dissenting opinion, Justice Field, along with Justices Harlan and Brewer concluded that the Eighth Amendment was violated by such "punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.* at 339–40 (Field, J., dissenting).

hard and painful labor, shackling at the ankle and wrist, and the permanent loss of basic civil rights.<sup>77</sup> The Court admitted that neither legislative history, *stare decisis*, nor commentary shed much light on the central meaning of the Eighth Amendment. The majority declared, however, "it is a precept of justice that punishment for crime should be graduated and proportionate to the offense."<sup>78</sup> Justice McKenna, writing for the majority, thus, invoked the accepted principle that the Constitution must be read in light of contemporary social needs as well as the Framers' intent.<sup>79</sup> The Court committed to a course of broad interpretation of the Eighth Amendment based on objective measures going beyond general sensibilities to include comparisons with punishments of similar crimes in other jurisdictions and comparisons with punishments for more serious crimes within the same jurisdiction.<sup>80</sup> Nowhere in the opinion did the Court qualify this bold statement of principle. Applying the comparative law analysis (that was later adopted by a majority of the Supreme Court in *Solem v. Helm*<sup>81</sup>), the Court held that the defendant's sentence was "cruel in its excess of imprisonment . . . [and] unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind."<sup>82</sup>

The *Weems* decision represents a basic constitutional principle—the legislature has the power to determine crimes and punishments, but that power is not absolute.<sup>83</sup> The power of judicial review creates an affirmative role for the Court. While the "function of the legislature is primary," constitutional limits exist, "and what those are the judiciary must judge."<sup>84</sup>

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<sup>77</sup> 217 U.S. at 364, 366.

<sup>78</sup> *Id.* at 367.

<sup>79</sup> *Id.* at 373.

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This [sic] is peculiarly true of constitutions . . . They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly human institutions can approach it."

*Id.* See also *id.* at 385–86 (White, J., dissenting).

<sup>80</sup> *Id.* at 375–81.

<sup>81</sup> 463 U.S. 277 (1983).

<sup>82</sup> *Weems*, 217 U.S. at 377.

<sup>83</sup> See *Kolender v. Lawson*, 461 U.S. 352, 355–61 (1983) (holding void for vagueness a California criminal statute that required persons who loiter or wander on the streets to provide "credible and reliable" identification); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161–71 (1972) (declaring vagrancy statute unconstitutionally vague); *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>84</sup> *Weems*, 217 U.S. at 379.

Although its answer in *Weems* was an unequivocal assertion of power, these principles were not exercised for almost fifty years.<sup>85</sup> In two Supreme Court decisions during that period, the Court rejected arguments based upon the Eighth Amendment challenging criminal sentences.<sup>86</sup> Finally in 1958, Chief Justice Warren in *Trop v. Dulles*<sup>87</sup> declared that the “basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>88</sup> Citing *Weems*, the Court recognized “that the words of the Amendment are not precise, and that their scope is not static.”<sup>89</sup> Thus, Warren concluded, “the

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<sup>85</sup> See Baker & Baldwin, *supra* note 45, at 31 n.38. The authors offer two possible explanations for the fifty-year hiatus between *Weems* and its modern progeny: (1) before incorporation into the Fourteenth Amendment, there were fewer opportunities for applying Eighth Amendment principles; (2) federal courts seem to confuse the constitutional issue with the nonconstitutional issue of appellate review of sentences.

The great majority of appeals against the length of an imposed sentence do not reach the constitutional threshold and merely amount to a request for an appellate review of the trial court’s discretion. Such an authority in appellate courts, to reduce sentences within the statutory limits, is itself a creature of statute.

*Id.* at 26 n.4 (citing *Gore v. United States*, 357 U.S. 386 (1958)). See generally James D. Hopkins, *Reviewing Sentencing Discretion: A Method of Swift Appellate Action*, 23 UCLA L. REV. 491 (1976)). Justice White’s powerful dissent in *Weems* and ambiguities in the majority opinion may explain also the lack of enthusiasm by lower federal courts. Baker & Baldwin, *supra* note 45, at 31 n.38 (citing Richard C. Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145, 149–50 (1967)).

<sup>86</sup> *Graham v. West Virginia*, 224 U.S. 616 (1912). The Court upheld a state recidivism statute which imposed a mandatory life sentence on a “thrice-convicted” felon. See generally Joshua Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 SW. L.J. 1063 (1981). The cryptic one sentence in the unanimous opinion rejecting the Eighth Amendment claim must be attributed to the refusal, as of 1912, to incorporate that guarantee into Fourteenth Amendment Due Process. *Id.* at 1093; *Badders v. United States*, 240 U.S. 391 (1916). *Badders* involved a federal sentence of five years concurrent and \$7000 cumulative fine for seven counts of mail fraud. *Id.* at 393. The one line rejection of the Eighth Amendment claim simply suggests that the Court did not find that sentence cruel and unusual. *Rummel v. Estelle*, 445 U.S. 263, 290 n.7 (1980).

<sup>87</sup> 356 U.S. 86 (1958).

<sup>88</sup> *Id.* at 100. The plurality held that the Eighth Amendment prohibited denationalization for a soldier’s crime of being absent without leave one day. *Id.* at 87. Chief Justice Warren authored an opinion joined by Justices Black, Douglas, and Whitaker. Justice Black, joined by Justice Douglas wrote a concurring opinion. Justice Brennan also concurred, but separately. Justice Frankfurter dissented, joined by Justices Burton, Clark and Harlan. *Id.*

<sup>89</sup> *Id.* at 100–01.

Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>90</sup> Four years later, a majority applied the principle to invalidate a criminal sentence in *Robinson v. California*.<sup>91</sup> The defendant in *Robinson* was given a ninety-day sentence for being addicted to the use of narcotics.<sup>92</sup> Acknowledging that such a punishment considered in the abstract was neither cruel nor unusual, the Court appealed to “contemporary human knowledge” to declare that any imprisonment would be disproportionate to the offense of addiction, placing that status beyond the legislative criminalization power.<sup>93</sup> Justice Stewart’s opinion emphasized the limited role of the Supreme Court to restrict the legislatures’ powers to criminalize certain conduct.<sup>94</sup> In this case, however, the legislature had gone beyond the constitutional limit.<sup>95</sup>

The trio of Supreme Court cases that followed, *Rummel v. Estelle*,<sup>96</sup> *Hutto v. Davis*,<sup>97</sup> and *Solem v. Helm*,<sup>98</sup> yield seemingly inconsistent holdings on proportionality review. The decisions represent the struggle within the Court to clarify the parameters of what has been a difficult issue for the Court and an important issue in both criminal and constitutional law.

## 2. Rummel v. Estelle

*Rummel v. Estelle*<sup>99</sup> was the first in the trio of Supreme Court cases concerning proportionality. William Rummel was convicted in 1964 of

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<sup>90</sup> *Id.* at 100. See Beth D. Liss, Note, *The Eighth Amendment: Judicial Self-Restraint and Legislative Power*, 65 MARQ. L. REV. 434, 442–43 (1982).

<sup>91</sup> 370 U.S. 660 (1962).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 666, 667.

<sup>94</sup> *Id.* at 664–65.

<sup>95</sup> Commentators have proposed a narrower interpretation of *Robinson*, contending that an illness, like addiction, may not be criminalized regardless of the proportionality of the punishment. Martin R. Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103, 1115 n.89; William H. Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639, 644 (1979); Herbert L. Packer, Comment, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1071 (1964); see also *Solem v. Helm*, 463 U.S. 277, 284 (1983) (citing *Robinson* for the proposition that “a single day in prison may be unconstitutional in some circumstances.”); Margret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 994 (1978) (asserting that any punishment was disproportionate to the crime of addiction).

<sup>96</sup> 445 U.S. 263 (1980).

<sup>97</sup> 454 U.S. 370 (1982).

<sup>98</sup> 463 U.S. 277 (1983).

<sup>99</sup> 445 U.S. 263 (1980).

fraudulent use of a credit card to obtain \$80 worth of goods; he was convicted in 1969 of passing a forged check for \$28.36; and finally, in 1973, he was convicted of obtaining money (\$120.75) by false pretenses.<sup>100</sup> All three nonviolent property offenses were classified as felonies under Texas law.<sup>101</sup> Rummel was prosecuted for his third or "trigger" offense under the Texas recidivist statute.<sup>102</sup> Under the statute, a third felony conviction after conviction and imprisonment for two prior felonies would result in a mandatory life sentence. Pursuant to the statute, the state trial judge imposed the obligatory life sentence.<sup>103</sup>

After unsuccessful appeals in the state appellate court and lower federal courts,<sup>104</sup> Rummel was denied relief by the Supreme Court as well. In a five-to-four decision, Chief Justice Rehnquist, writing for the majority, held that a state could constitutionally impose a sentence of life imprisonment for these three sequential nonviolent felonies.<sup>105</sup>

The Court did so by understating and distinguishing the precedent that had conceded a principle of proportionality, stressing that recent applications had been limited to the death penalty because of its uniqueness in its finality and

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<sup>100</sup> *Id.* at 264–66.

<sup>101</sup> *Id.* at 266.

<sup>102</sup> *Id.*; see also Baker & Baldwin, *supra* note 45, at 33 n.54. The Court did not expressly consider Rummel's complete record but was made aware of it. Rummel had been convicted of at least twelve separate crimes between 1959 and 1973, some of which were rather serious as, for example, possession of a deadly weapon, burglary, and aggravated assault. *Rummel*, 445 U.S. at 266.

<sup>103</sup> *Rummel*, 445 U.S. at 266.

<sup>104</sup> The Texas Court of Criminal Appeals affirmed Rummel's conviction. *Rummel v. State*, 509 S.W.2d 630 (Tex. Crim. App. 1974). He then filed an unsuccessful petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Texas claiming, *inter alia*, that his sentence was unconstitutionally disproportionate. A divided panel of the United States Court of Appeals for the Fifth Circuit reversed the district court's denial of relief. *Rummel v. Estelle*, 568 F.2d 1193 (5th Cir. 1978). On rehearing, the court, sitting en banc, rejected the panel's ruling and affirmed the district court's denial of the petition. *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 263 (1980).

<sup>105</sup> 445 U.S. at 285. The Court focused on the state's interest in punishing a recidivist. The Court noted that under Texas law a recidivist must be twice convicted of a felony and actually serve a prison sentence, demonstrating that this does not deter him from returning to crime once he is released. Rummel had been graphically informed of the consequences of repeated criminal conduct and given an opportunity to reform, all to no avail. "[The Texas statute] thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole." *Id.* at 278 (footnote omitted).

absoluteness.<sup>106</sup> A "bright line" was drawn between the ultimate sanction and all lesser terms of imprisonment.<sup>107</sup> As for *Weems*, the Court limited that decision to "its peculiar facts," including the minor nature of the offense, the lengthy minimum term, and the extraordinary accessory punishments of the *cadena temporal*.<sup>108</sup> The Court stated, however, that for crimes classified as felonies, that is, punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative.<sup>109</sup> The Court further emphasized the highly subjective character of the judgment made in marking out constitutional limits on amounts of punishment and the desirability in a federal system of permitting wide latitude of judgment to the states. "Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging . . . ."<sup>110</sup> Rejecting Justice Powell's dissent which compared Rummel's sentence to that for other crimes in Texas and the punishment for the same crime in other states, Justice Rehnquist stated:

Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment "grossly disproportionate" to his offenses or to the punishment he would have received in the other States . . . . [O]ur Constitution "is made for people of fundamentally differing view [sic] . . . ." Arizona punishes as a felony the theft of any "neat or horned animal," regardless of its value; California considers the theft of "avocados, citrus or deciduous fruits, nuts and artichokes" particularly reprehensible.<sup>111</sup>

The majority was only willing to concede in a footnote that one could imagine extreme examples when the proportionality principle would come into play.<sup>112</sup> The dissent posed a hypothetical in which the legislature makes overtime parking a felony punishable by life imprisonment.<sup>113</sup> The majority conceded that the proportionality principle would come into play in such a situation.<sup>114</sup>

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<sup>106</sup> *Id.* at 274-75.

<sup>107</sup> *Id.* at 275. Referring to its line of death penalty cases, including *Coker v. Georgia*, 433 U.S. 584 (1977), the Court stated that it could draw a "bright line" for death penalty cases but that it is much more difficult to draw a clear line between different lengths of imprisonment.

<sup>108</sup> *Rummel* at 274, 275.

<sup>109</sup> *Id.* at 274.

<sup>110</sup> *Id.* at 282 n.27.

<sup>111</sup> *Id.* at 282 (footnotes omitted).

<sup>112</sup> *Id.* at 274 n.11.

<sup>113</sup> *Id.* at 288 (Powell, J., dissenting).

<sup>114</sup> *Id.* at 274 n.11.



Justice Powell's dissent merits attention because it produces the test that would be applied by the majority in *Solem v. Helm*.<sup>115</sup> The dissent's starting premise, based on legislative history, intent of the framers, and common law, was that the disproportionality analysis is an inherent aspect of the cruel and unusual punishments clause. Relying on *Weems* and other noncapital cases as well as on the death penalty decisions, the dissent felt a constitutional obligation to measure "the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender."<sup>116</sup> Justice Powell set forth three objective criteria for reviewing proportionality challenges to the length of criminal sentences: (1) the nature of the offense; (2) comparison with sentences imposed in other jurisdictions for commission of the same crime; and (3) comparison with sentences imposed in the same jurisdiction for commission of other crimes.<sup>117</sup>

Applying these criteria to the facts presented, Rummel's challenge drew favor because of the nonviolent nature of the offense. Next, the dissent found that Texas punished recidivists dramatically harsher than other jurisdictions. Finally, within the Texas statutory scheme, Rummel's sentence for three nonviolent felonies was harsher than what first and second offenders who committed more serious crimes, such as murder, kidnapping, and rape could possibly receive.<sup>118</sup> Thus, the dissent concluded that Rummel's sentence violated the Constitution.<sup>119</sup> To the dissenters, the "[o]bjective indicia of evolving standards of decency justified the Court's exercise of its historic role, first recognized in *Weems*, as final arbiter of the cruel and unusual punishments clause."<sup>120</sup> This battle to establish the precise contours of the proportionality principle was fought again one year later in the second precedent in the trio.

### 3. *Hutto v. Davis*

In *Hutto v. Davis*,<sup>121</sup> the Supreme Court reversed the Fourth Circuit, stating that "unless we want anarchy to prevail within the federal judicial

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<sup>115</sup> Justices Brennan, Marshall, and Stevens joined Justice Powell's dissent. *Id.* at 285 (Powell, J., dissenting).

<sup>116</sup> *Id.* at 288 (Powell, J., dissenting).

<sup>117</sup> *Id.* at 295.

<sup>118</sup> *Id.* at 295-303.

<sup>119</sup> *Id.* at 302-03.

<sup>120</sup> Baker & Baldwin, *supra* note 45, at 35.

<sup>121</sup> 454 U.S. 370 (1982). The procedural history of *Davis* explains the Court's special effort to reaffirm its holding in *Rummel*. The District Court for the Western District of Virginia granted Davis's section 2254 petition, filed before the Supreme Court's decision in *Rummel*, under previously established Fourth Circuit precedent. *Davis v. Zahrdnick*, 432 F. Supp. 444, 451 (W.D. Va. 1977). A panel of the United States Court of Appeals for the Fourth Circuit reversed and upheld the sentence by distinguishing between sentences for life

system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."<sup>122</sup>

Roger Davis was convicted of possession of marijuana with intent to distribute; the amount of marijuana involved was approximately nine ounces, having a street value of about \$200. A jury imposed a sentence of \$10,000 and a twenty-year prison term on each conviction, the terms to run consecutively. The sentences were well within the Virginia statutory maximum of a \$25,000 fine and a forty-year prison term.<sup>123</sup>

In affirming the sentence, the majority<sup>124</sup> defended the "bright line" drawn between the death penalty, which differs in kind, and terms of imprisonment, which differ only in duration.<sup>125</sup> The major premise was that Eighth Amendment judgments should not be subjective.<sup>126</sup> The minor premise in the decision was that any determination of excessiveness between two terms of years would be subjective. The Court, therefore, concluded that challenges against sentences for terms of years were beyond the constitutional range of the federal courts.<sup>127</sup> But once again, the Court conceded that the proportionality principle would come into play in some situations; such as the *Rummel* dissenter's overtime parking hypothetical.<sup>128</sup> "*Rummel* stands for the proposition that federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment,' . . . and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'"<sup>129</sup> The majority's opinion thus conceded some role, albeit limited, for the federal courts to review the lines drawn by the state legislatures.<sup>130</sup>

Justice Powell wrote a concurrence in which he "reluctantly" admitted that the *Rummel* precedent required reversal. Davis's crimes were more serious and

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and sentences for terms of years. *Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978). On rehearing, en banc, the Fourth Circuit vacated the panel opinion and affirmed the district court's decision to grant relief, adopting the district court's analysis. *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979) (en banc). The Supreme Court granted the writ of certiorari, vacated the judgment, and remanded for further consideration in light of the after-decided *Rummel v. Estelle*. *Hutto v. Davis*, 445 U.S. 947 (1980). An equally-divided en banc Fourth Circuit then disagreed on the precedential impact of *Rummel* and therefore affirmed the district court's judgment. *Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981).

<sup>122</sup> *Davis*, 454 U.S. at 375. The Supreme Court reprimanded the lower court's action after the first remand.

<sup>123</sup> *Davis v. Davis*, 585 F.2d 1226, 1229 (4th Cir. 1978).

<sup>124</sup> The per curiam opinion was joined by Chief Justice Burger and Justices White, Blackmun, Rehnquist, and O'Connor.

<sup>125</sup> 454 U.S. at 373-74.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 374 n.3.

<sup>129</sup> *Id.* at 374 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272, 274 (1980)).

<sup>130</sup> *Id.* at 374 n.3.

his sentence less severe than the sentence upheld in *Rummel*. Hence stare decisis served as another objective measure in the judicial assessment of proportionality.<sup>131</sup> Three Justices, however, dissented;<sup>132</sup> critical of the majority for a “serious and improper expansion of *Rummel*” which the Justices read as limited to cases involving the overwhelming state interest to punish recidivists with severe sentences which otherwise would be disproportionate.<sup>133</sup> The dissent argued that *Davis* was one of those concededly rare cases in which the sentence violated the Constitution.<sup>134</sup>

#### 4. *Solem v. Helm*

In the next Term, just three years after *Rummel*, the Supreme Court returned to the cruel and unusual punishment issue. In *Solem v. Helm*,<sup>135</sup> Justice Powell tried to clarify the Court’s prior decisions and establish an analytical framework to be applied in future cases.

Jerry Helm was a thirty-six-year-old alcoholic and bad check artist at the time of sentencing. Helm had spent much of the previous fifteen years in the penitentiary.<sup>136</sup> His six previous felonies included: three third-degree burglaries (1964, 1965, 1969); obtaining money under false pretenses (1972); grand larceny (1973); and a third offense of driving while intoxicated (1975).<sup>137</sup> In 1979, Helm pled guilty to uttering a “no account” check for \$100 which ordinarily carries a maximum punishment of a \$5000 fine and five years imprisonment.<sup>138</sup> Under the South Dakota statutory scheme, however, Helm’s

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<sup>131</sup> *Id.* at 379-81 (Powell, J., concurring).

<sup>132</sup> *Id.* at 381. (Brennan, J., dissenting). Justices Brennan, Marshall and Stevens dissented.

<sup>133</sup> *Id.* at 382-83. The dominant factor for the dissent was intrajurisdictional disparity. *Id.* at 385-86. A letter from the prosecutor labeling Davis’s sentence as “grossly unjust,” because by comparison there was such a “grave disparity in sentencing” between the sentence and other Virginia sentences in comparable drug offenses. The Virginia Legislature had later reduced the maximum sentence for the same offenses to less than one-half of the sentence Davis received. *Id.*; see also *id.* at 377-79 (Powell, J., concurring).

<sup>134</sup> *Id.* at 384 (Brennan, J., dissenting). Brennan argued that the general principle of deference to the legislatures could not justify “the complete abdication of [the Court’s] responsibility to enforce the Eighth Amendment.” *Id.* at 383. Brennan also said that the Court failed to demonstrate why this was not one of those “exceedingly rare” cases requiring invalidation of the sentence as disproportionate, violative of the Eighth Amendment. Instead, the Court reversed the Fourth Circuit which had undertaken that analysis “upon full review and with the benefit of a substantial record, oral argument, and briefs.” *Id.* at 384.

<sup>135</sup> 463 U.S. 277 (1983).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 279-80.

<sup>138</sup> *Id.* at 281.

record made him eligible for life imprisonment without the possibility of parole, which is what he received.<sup>139</sup> After being refused relief in the state appellate system<sup>140</sup> and in his 28 U.S.C. section 2254 proceeding in the district court, Helm succeeded in the Eighth Circuit.<sup>141</sup> In a decision written by Justice Powell, the author of the *Rummel* dissent and the *Davis* concurrence, the Supreme Court affirmed the appellate decision.<sup>142</sup> *Helm* represented a dramatic turn in the course of the Court's recent path.

Justice Powell's analysis began with principles of constitutional text and history.<sup>143</sup> He traced the constitutional value of proportionality back to the original framers' intent and English common law.<sup>144</sup> Justice Powell relied on a century of Supreme Court precedents. He cited *Weems* as "the leading case" and also noted *Robinson* and the capital punishment line of cases.<sup>145</sup> Justice Powell emphasized the need for deference to both the legislature and the trial courts. First, deference is due to the paramount authority of the legislature in determining general limits in sentencing. Second, deference should be shown to the informed discretion of trial courts in sentencing particular offenders.<sup>146</sup> Such deference necessarily means that successful proportionality challenges will be rare. However, "no penalty is per se constitutional."<sup>147</sup> The majority therefore held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."<sup>148</sup>

Powell further stated that when sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that have been "recognized" in previous cases: (1) a comparison of the gravity of the offense

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<sup>139</sup> *Id.* at 282. For the complete case history before the Supreme Court consideration see Robin R. Bennett, Note, *Helm v. Solem: A Favorable Decision for Recidivist Facing Life Sentences Without Parole*, 27 ST. LOUIS U. L.J. 663, 675-79 (1983); Nancy Keir, Note, *Solem v. Helm: Extending Judicial Review Under the Cruel and Unusual Punishments Clause to Require "Proportionality" of Prison Sentences*, 33 CATH. U. L. REV. 479, 501-03 (1984); Steven Quattlebaum, Note, *Helm v. Solem: Can A Prison Sentence Constitute Cruel and Unusual Punishment?*, 36 ARK. L. REV. 673, 682-87 (1983).

<sup>140</sup> *State v. Helm*, 287 N.W.2d 497 (S.D. 1980). Two justices would have reversed and remanded for resentencing; two justices affirmed the sentence; the justice who cast the deciding vote concurred with the affirmance based on the state clemency statutes. *Id.* at 499.

<sup>141</sup> *Helm v. Solem*, 684 F.2d 582 (8th Cir. 1982). The panel distinguished *Rummel* and *Davis*—proving to be an important aspect of the Supreme Court's proportionality analysis in its treatment of *Helm*.

<sup>142</sup> *Helm*, 463 U.S. at 303.

<sup>143</sup> *Id.* at 284-86.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 286-90.

<sup>146</sup> *Id.* at 290 n.16.

<sup>147</sup> *Id.* at 290.

<sup>148</sup> *Id.*

and the harshness of the penalty; (2) a comparison with sentences imposed for other crimes in the same jurisdiction; and (3) a comparison with sentences imposed for the same crime in other jurisdictions.<sup>149</sup> The conceded relativity of these three criteria does not reduce them to purely subjective measures. Courts are assumed to be competent to make such broad comparisons of crime, criminal, and sentence. Evaluating harm and determining culpability are standard techniques of the judicial art.<sup>150</sup>

Applying his test to the facts, Powell concluded that the sentence was unconstitutional. The trigger crime of uttering a \$100 no-account check was passive, nonviolent, and involved a relatively small amount.<sup>151</sup> The South Dakota statute carried heavy penalties for recidivism, however, and made relevant all of Helm's prior offenses, which the Court characterized as nonviolent, relatively minor, offenses. As for the sentence, life imprisonment without the possibility of parole was the most severe punishment available in South Dakota.<sup>152</sup> Thus, the first criteria suggested an imbalance between crime and punishment.<sup>153</sup> Second, the Court reviewed the entire legislative scheme of authorized punishments in the state. Only a few of the more serious crimes were mandatorily punished by life imprisonment, and for a larger group, life imprisonment was authorized.<sup>154</sup> Life imprisonment was not authorized at all for a large group of very serious offenses.<sup>155</sup> Thus, the Court concluded that Helm's life sentence was equivalent or more severe than sentences that South Dakota imposed for more serious crimes.<sup>156</sup> Third, the Court considered the sentence in the national context and concluded that Helm would have received a less severe punishment in every other state.<sup>157</sup>

Justice Powell made a point to distinguish the facts in *Rummel* from those in *Helm*, highlighting the difference in the Texas parole system from the executive commutation system in South Dakota.<sup>158</sup> Parole is a regular part of the rehabilitative process, is governed by legal standards, and assuming good

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<sup>149</sup> *Id.* at 291–92. Powell's objective factors were espoused in his *Rummel* dissent, but can also be traced back to the *Weems* opinion. See *Weems*, 217 U.S. 349 (1910).

<sup>150</sup> *Helm*, 463 U.S. at 292–95. The opinion provides some illustrations of this analysis. Widely shared views consider violent crime more serious. A lesser offense should not be punished more severely than a greater offense. Traditional concepts of mental state and motive differentiate among offenders. On a case-by-case basis, one sentence of imprisonment may be distinguished from another.

<sup>151</sup> *Id.* at 297–98.

<sup>152</sup> *Id.* at 297.

<sup>153</sup> *Id.* at 296–97.

<sup>154</sup> *Id.* at 298–99.

<sup>155</sup> *Id.* at 299.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 299–300.

<sup>158</sup> *Id.* at 301–03 nn. 31–32.

behavior, is the normal expectation in the vast majority of cases.<sup>159</sup> On the other hand, commutation is an ad hoc exercise of executive clemency lacking articulable standards.<sup>160</sup> The possibility of commutation is nothing more than a hope in something that is rarely exercised.<sup>161</sup> This analysis was consistent with the case-by-case approach proffered by Justice Powell. The dissent, however, blasted the majority for its disregard of precedent.<sup>162</sup>

The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of *stare decisis*, trespasses gravely on the authority of the states, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases.<sup>163</sup>

The dissenters were outraged that the majority would apply the analytical test that the *Rummel* Court "categorically rejected" as insufficient. Chief Justice Burger's scathing dissent initiates an intra-Court confrontation over *stare decisis* which reoccurs in *Harmelin v. Michigan*:

Today, the Court ignores its recent precedent . . . . Today's conclusion by five Justices that they are able to say that one offense has less "gravity" than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature . . . . Legislatures are far better equipped than we are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes.<sup>164</sup>

Finally, Chief Justice Burger reiterated the concern over limits on such review, warning the Court that "[b]y asserting the power to review sentences of imprisonment for excessiveness [it] launches into uncharted and unchartable waters."<sup>165</sup> He made the traditional "floodgates" argument, stating that he could see "no limiting principle in the Court's holding."<sup>166</sup> Justice Burger, of

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 303.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 304-18 (Burger, C.J., dissenting). Justices White, Rehnquist, and O'Connor joined Chief Justice Burger's dissent.

<sup>163</sup> *Id.* at 304 (Burger, C.J., dissenting).

<sup>164</sup> *Id.* at 314.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 315. Justice Burger sought to illustrate the vulnerability of the decision.

Today [the court] holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly "nonviolent" felony. How about the eighth "nonviolent" felony? The ninth? The twelfth? Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price fixing? The

course, was not alone in his fears and was only echoing the concerns previously expressed by the Court. The underlying principles of judicial restraint and legislative deference were the bedrock of *Rummel* and *Davis*.

#### D. Reconciliation of the Three Leading Cases

The *Davis* majority read *Rummel* as placing the length of sentences for terms of years beyond the judicial domain in all but “exceedingly rare” situations. *Davis* was not such a situation.<sup>167</sup> Justice Powell, in his concurrence, discerned the same “rarity” principle, and when he compared the crimes and sentences in *Rummel*, he concluded that the disproportionality in *Rummel* had been greater.<sup>168</sup> The dissent in *Davis*, however, which concluded that the sentence in *Rummel* was disproportionate, would have given *Rummel* only narrow application, limiting it to recidivist sentences.<sup>169</sup>

*Rummel* and *Helm* followed two distinct analytical approaches for evaluating proportionality claims.<sup>170</sup> The *Rummel* analytical approach was generalized. The plurality emphasized the rarity of successful claims, rejected specific comparisons of the sentences, and found controlling the states’ interest in punishing recidivists with harsh sentences. In contrast, the *Helm* analysis was particularized. The majority strove for objectivity in comparatively evaluating the crime, the offender, and the sentence. The two analytical approaches are directly opposed.

The *Helm* majority distinguished *Davis* and *Rummel* on the facts and seized the opportunity to set forth as the controlling precedent its own analytical framework within the factual constraints of the two prior cases.<sup>171</sup> First, the life without parole term in *Helm* was an order of magnitude more severe than *Davis*’s forty years. Second, although *Rummel* was essentially the same case, the Court in *Helm* answered that there was a constitutional difference between the possibility of parole in *Rummel* and the possibility of executive clemency in *Helm*.<sup>172</sup> With *Davis* and *Rummel* limited to their facts and distinguished, the *Helm* majority was now free to apply the objective three-part analysis rejected in *Rummel* and to hold *Helm*’s sentence unconstitutional.

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permutations are endless and the Court’s opinion is bankrupt of realistic guiding principles.

*Id.* at 314.

<sup>167</sup> *Hutto v. Davis*, 454 U.S. 370, 373-74 (1982).

<sup>168</sup> *Id.* at 375-81. (Powell, J., concurring).

<sup>169</sup> *Id.* at 381-88. (Brennan, J., dissenting).

<sup>170</sup> See Allen F. Harris & Sam Wethern, Note, *Application of the Proportionality Doctrine to a Punishment of Imprisonment*, 35 MERCER L. REV. 681, 689 (1984).

<sup>171</sup> Baker & Baldwin, *supra* note 45, at 45.

<sup>172</sup> *Solem v. Helm*, 463 U.S. 277, 300 (1983).

The dissent in *Helm* implied that the majority had, in effect, overruled *Rummel* and *Davis*. After all, the *Helm* majority reads like the *Rummel* dissent. The author of the *Helm* majority and the *Rummel* dissent was the same Justice, and all but one Justice viewed the two cases as the same. The same text, history, and precedents *Rummel* narrowed were broadened in *Helm*. The expansion and refinement of Eighth Amendment jurisprudence asked for and refused in *Rummel* was offered again and justifiably accepted in *Helm*. The reasons for this switch can be explained by comparing the votes in *Rummel* and *Helm*. Although Justice O'Connor replaced Justice Stewart, that change in Justices cannot explain the expansion of the proportionality doctrine.<sup>173</sup> Justice Stewart voted with the plurality in *Rummel*, and Justice O'Connor voted with the dissent in *Helm*.<sup>174</sup> As one authority noted, "[t]he most significant change came, not in personnel, but in the vote of one Justice. Justice Blackmun voted against the proportionality claim in *Rummel* but voted in favor of the proportionality claim in *Helm*."<sup>175</sup> All the remaining Justices stayed on the same side of the issue.<sup>176</sup> Although not the key to explaining *Helm*, a change in Justices has proved significant to this issue. The more recent changes in the

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<sup>173</sup> Baker & Baldwin, *supra* note 45, at 42.

<sup>174</sup> Preliminary evaluations by court-watchers of Justice O'Connor suggest that her replacement of Justice Stewart would not make the Court more sympathetic to a proportionality claim. See Robert E. Riggs, *Justice O'Connor: A First Term Appraisal*, 1983 B.Y.U. L. REV. 1, 11-12, 16, 20; Carl R. Schenker, Jr., "Reading" Justice Sandra Day O'Connor, 31 CATH. U. L. REV. 487, 503 (1982). Justice O'Connor seems more aligned with the Justices than was Justice Stewart, and, in fact, voted with the *Rummel* plurality in *Davis*. See also *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 305 (1983) (noting five-year average voting alignments).

<sup>175</sup> Justice Blackmun did not write an opinion in any of the three decisions. Justice Blackmun's earlier constitutional philosophy, however, has been summarized as emphasizing "judicial restraint, an appreciation for the limits of judicial authority and deference to state and legislative prerogatives." David Fuqua, Comment, *Justice Harry A. Blackmun: The Abortion Decisions*, 34 ARK. L. REV. 276, 276 (1980) (quoting Michael Poll, *Harry A. Blackmun*, V THE JUSTICES OF THE UNITED STATES SUPREME COURT—THEIR LIVES AND MAJOR OPINIONS 3, 8 (Leon Friedman ed., 1978)). Justice Blackmun has also been described as capable of "astonishing judicial leaps," illustrated by his vote to strike the sentence in *Helm* and what has been viewed as an overall change in Justice Blackmun's social vision concerning the Court's role and his personal role within the institution. See generally Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983); Lyle Denniston, *Sandra Day O'Connor: First-Term Review*, CAL. LAW., Feb. 1983, at 29 (Justice O'Connor's ascendancy also has pushed Justice Blackmun toward a more liberal view.).

<sup>176</sup> Baker & Baldwin, *supra* note 45, at 42 (footnote added). The *Rummel* division was Chief Justice Burger and Justices Stewart, White, Blackmun, and Rehnquist versus Justices Brennan, Marshall, Powell, and Stevens. The *Helm* division was Justices Brennan, Marshall, Blackmun, Stevens, and Powell versus Chief Justice Burger and Justices White, Rehnquist, and O'Connor.



Court, to a more conservative composition, swing the *Harmelin v. Michigan* vote in the other direction.

Consequently, under a “last-decided-best-decided theory of stare decisis,”<sup>177</sup> *Helm* became the deciding precedent. It “appear[ed] to have established some consistency in an otherwise incongruous case law.”<sup>178</sup> The principles clarified in *Helm* seemed to be concrete. First, “[s]uccessful proportionality challenges against sentences of imprisonment—either for life or for a term of years—are rare, but possible.”<sup>179</sup> Second, if that rare occasion occurred, review of proportionality claims would be based on the objective comparative factors set forth in *Helm*.<sup>180</sup> But beyond a life sentence without possibility of parole for the crimes committed in *Helm*, the Court left unanswered the question of “how to discern and apply the rule in *Helm*.”<sup>181</sup>

Finally, eight years later, the Court decided *Harmelin v. Michigan*.<sup>182</sup> Once again, a divided Court provided little guidance in a decision that is full of contradiction and is generally unsettling.

#### IV. *HARME LIN V. MICHIGAN*

Ronald Harmelin challenged his sentence on two grounds: its severe length and its mandatory operation.<sup>183</sup> He asserted that Michigan’s mandatory life

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<sup>177</sup> Baker & Baldwin, *supra* note 45, at 47.

<sup>178</sup> *Id.* at 48.

<sup>179</sup> *Id.* at 46.

<sup>180</sup> *Id.* See *supra* text accompanying note 149 (discussing *Helm*).

<sup>181</sup> *Id.*

<sup>182</sup> 111 S. Ct. 2680 (1991).

<sup>183</sup> *Id.* at 2684. An interesting point is made in the Brief of Amici Curiae, the Washington Legal Foundation, et al. in support of the respondent. Amici pointed out that in the conclusion the petitioner Harmelin requested that the Court “should hold that the Michigan sentencing statute in this case is unconstitutional.” Petitioner’s Brief at 47. Yet the Petitioner framed his arguments in the context of *Helm*, which struck down the sentence “as applied” to the petitioner in that case, but not recidivist statutes altogether. Harmelin’s challenge to the mandatory nature implies that he may have wanted to assert the unconstitutionality of the statute on its face, a clearly difficult task given the acceptance of mandatory sentencing in this country. Amici framed the question as only whether or not the imposition of a life sentence without parole in this particular case is a punishment “so grossly disproportionate” so as to constitute cruel and unusual punishment under the Eighth Amendment.

The Court treated Harmelin’s challenge, like its predecessors, as a “disproportionate as applied” challenge; “that an otherwise neutral enactment has been ‘applied and administered by public authority with an evil eye and an unequal hand.’” Baker & Baldwin, *supra* note 45, at 50 (asserting that a constitutional process, legislative enactment, and judicial application have reached an unconstitutional result (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)). This analysis was illustrated in *Runnel*, *Davis*, and *Helm*. The

imprisonment with no parole statute was unconstitutional "as applied." In a five-to-four decision, the Court upheld the sentence. Justice Scalia wrote the opinion, but the majority concurred in Part IV only. Justice Scalia's Parts I, II, and III were joined by Chief Justice Rehnquist alone.<sup>184</sup> Justices O'Connor and Souter joined a concurrence authored by Justice Kennedy;<sup>185</sup> Justice White wrote a dissent that Justice Blackmun and Justice Stevens joined.<sup>186</sup> Justice Marshall and Justice Stevens wrote separate dissents.<sup>187</sup> An examination of the separate opinions is necessary to understand the current status of proportionality as a constitutional principle. Although narrowed in the most recent battle among the Supreme Court Justices, Eighth Amendment proportionality review will remain a constitutional principle—but admittedly a difficult one on which to succeed.

### A. Justice Scalia

Justice Scalia supported his opinion with a detailed examination of the history behind the original framers' inclusion of the Eighth Amendment in the Constitution. His main purpose for this excursion was to refute Justice Powell's contention in *Helm* that the Eighth Amendment was intended by the framers to address proportionality in criminal sentencing. By asserting that there is no requirement of proportionality review outside of the capital sentence context, Justice Scalia disposed of Harmelin's challenge to the severity of his sentence without any extended analysis of the crime, the criminal, or the punishment.

Justice Scalia's examination traced the Eighth Amendment's language to its original roots in English Law, specifically the English Declaration of Rights of 1689.<sup>188</sup> The language used in the Eighth Amendment mirrors that within the English Declaration of Rights. Its meaning is interpreted to be the same in both documents.<sup>189</sup> Justice Scalia concluded that the Americans who adopted the Eighth Amendment intended it to be a check on the ability of the Legislature to authorize particular "modes" of punishment—such as barbaric or otherwise

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argument in those cases was not that the statutes were unconstitutional, but that "as applied" they were disproportionate. "The issue becomes uniquely factbound by sentence and offender." Baker & Baldwin, *supra* note 45, at 51. In *Harmelin*, the Court answered both the narrow question of "as applied" proportionality and the implied assertion of broader unconstitutionality in the negative.

<sup>184</sup> The interim edition of The Supreme Court Reporter misnumbered the Parts as I, III, IV, and V. 111 S. Ct. 2680 (1991).

<sup>185</sup> *Id.* at 2702–09 (Kennedy, J., concurring).

<sup>186</sup> *Id.* at 2709–19 (White, J., dissenting).

<sup>187</sup> *Id.* at 2719 (Marshall, J., dissenting); *id.* at 2719–20 (Stevens, J., dissenting) (with whom Justice Blackmun joined).

<sup>188</sup> *Id.* at 2686–89; see also *supra* notes 27–31 and accompanying text.

<sup>189</sup> *Id.* at 2686–87.

cruel methods of punishment that are not regularly or customarily employed.<sup>190</sup> Also emphasized in Justice Scalia's historical arguments is the fact that the "notion of 'proportionality' was not a novelty" during that period.<sup>191</sup> Several states either had incorporated proportionality provisions into their state constitutions, or had at least considered them.<sup>192</sup> Thus, Justice Scalia found that "to use the phrase 'cruel and unusual punishment' to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly."<sup>193</sup>

However accurate Justice Scalia's historical arguments are, they are only evidence in support of his narrow interpretation of the Eighth Amendment. As noted in Parts II and III of this Comment, a broader interpretation of the Eighth Amendment is supported by history as well.<sup>194</sup> More importantly, case precedent dating back over a decade indicates a broader interpretation of Eighth Amendment protection, including proportionality in criminal sentences.<sup>195</sup>

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<sup>190</sup> *Id.* at 2691.

<sup>191</sup> *Id.* at 2692.

<sup>192</sup> *Id.* In 1778, for example, the Virginia Legislature narrowly rejected a comprehensive "Bill for Proportioning Punishments" introduced by Thomas Jefferson. Proportionality provisions had been included in several state constitutions. *See, e.g.*, PA. CONST., § 38 (1776) (punishments should be "in general more porportionate to the crimes"); N.H. BILL OF RIGHTS, pt. 1, art. XVIII (1784) ("all penalties ought to be proportioned to the nature of the offence"); S.C. CONST., art. XL (1778) (same). There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them. Both the New Hampshire Constitution, adopted eight years before ratification of the Eighth Amendment, and the Ohio Constitution, adopted twelve years after, contain, in separate provisions, a prohibition of "cruel and unusual punishments" ("cruel *or* unusual," in New Hampshire's case) *and* a requirement that "all penalties ought to be proportioned to the nature of the offence." *Id.* at 2692 (footnote omitted) (citations omitted).

<sup>193</sup> *Harmelin* 111 S. Ct. at 2680.

<sup>194</sup> *See supra* notes 44–61 and accompanying text.

<sup>195</sup> *See supra* notes 41–49 and accompanying text. In general, there are many doctrines in constitutional law based upon broad interpretation of the Constitution. If limited to its explicit language, many fundamental constitutional rights, such as the right to privacy, would not exist. Justice Scalia's historical arguments, albeit sound, are not particularly persuasive on the issue, but attest more to his philosophical bent on constitutional interpretation. His bold assertion that the Eighth Amendment contains no proportionality "guarantee" is simply contrary to the weight of authority. He carefully used the word "guarantee," and he later backtracked and conceded that the Eighth Amendment is properly applied to capital punishment cases. Thus, the entire removal from the judiciary of Eighth Amendment proportionality review is unlikely.

### 1. *Issue: Severity of the Sentence*

Focusing on the narrow issues raised, Justice Scalia rejected Harmelin's assertion that his sentence was disproportionate to the crime he committed. He found, as Chief Justice Rehnquist found in *Rummel*, *Davis*, and *Helm*, that there are no adequate textual or historical standards to enable judges to determine whether a particular penalty is disproportionate. Justice Scalia noted that the criteria used for application of a three-factor test in *Helm* had been explicitly rejected in *Rummel* and stated that *Helm* was "wrong and should be overruled."<sup>196</sup> "While there are relatively clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are 'cruel and unusual,' proportionality does not lend itself to such analysis."<sup>197</sup> Justice Scalia reiterated the major criticism of proportionality review that it is only a substitution of individual subjective moral values for those of the legislature.<sup>198</sup> Thus, Justice Scalia offered no analysis whatsoever on the merits of Harmelin's claims, but disposed of this issue based upon his belief that proportionality review should not be conducted at all outside of the death penalty context.

### 2. *Issue: Mandatory Nature of Harmelin's Sentence*

Justice Scalia separately, in Part IV, addressed the issue of the mandatory nature of the penalty. He rejected Harmelin's assertion that a sentence is unconstitutional simply because the judge is required to impose it without any consideration of mitigating factors, such as the fact that Harmelin had no prior felony convictions. Harmelin urged the Court to require a sentencing scheme similar to that required in capital sentencing. According to Justice Scalia, Harmelin's proposal would require that a sentence of "life in prison without possibility of parole [be] simply the most severe of a range of available penalties that the sentencer may impose after hearing evidence in mitigation and aggravation."<sup>199</sup>

Although conceding that Harmelin's argument that mitigating factors must be taken into account finds support in the Court's death penalty jurisprudence, he distinguished that arena based upon the same "bright line" drawn in

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<sup>196</sup> *Harmelin v. Michigan*, 111 S. Ct. 2680, 2681 (1991).

<sup>197</sup> *Id.* at 2696. Justice Scalia related his review that the framers deliberately omitted from the Eighth Amendment explicit language requiring proportionality in criminal sentences to a lack of an objective standard. *Id.* at 2697.

<sup>198</sup> *Id.* at 2697.

<sup>199</sup> *Id.* at 2701.

*Rummel*.<sup>200</sup> Justice Scalia explicitly rejected this extension of capital sentencing doctrine. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."<sup>201</sup> Justice Scalia concluded "that a sentence which is not otherwise cruel and unusual [does not] become so simply because it is 'mandatory.'"<sup>202</sup>

In sum, Justice Scalia espoused a narrow interpretation of the Eighth Amendment and the Supreme Court precedent on this issue. His opinion argued against any proportionality review of the length of criminal sentences, focusing on the three major criticisms of such a doctrine: (1) the framers of the Constitution did not intend for the Eighth Amendment to require proportionality in the length of criminal sentences because it contains no express language which states such a requirement; (2) concepts of federalism restrict the judiciary's power to review legislative action, and thus, designating criminal sentences is within the discretion of the legislature; (3) even if a proportionality principle exists, objective standards of review are inadequate and thus result in imposition of the subjective values of Supreme Court Justices.<sup>203</sup>

Justice Scalia disposed of *Helm* as wrongly decided and retreated to *Rummel* and *Davis* as the controlling precedents. Justice Scalia's arguments are valid and find support in the dissent in *Helm* and the majority opinions in *Rummel* and *Davis*. Under Justice Scalia's narrow interpretation, however, any prison sentence, however severe, for any crime, however petty, would be beyond review under the Eighth Amendment. Only "modes" or methods of punishment would be reviewable. Consequently, capital punishment—one mode of punishment—would either be completely barred or left to the discretion of the legislature. Thus, it is easy to understand why only Justice Rehnquist, the author of the *Rummel* decision, concurred in the Parts of the opinion expressing this narrow view.

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<sup>200</sup> "It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Id.* at 2702 (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)); *see also* *Rummel v. Estelle*, discussed *supra* notes 99–120 and accompanying text.

<sup>201</sup> *Harmelin*, 111 S. Ct. at 2701.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 2683–2702.

## B. Justice Kennedy's Concurrence

Justice Kennedy, in his concurrence, began with a recognition that the Eighth Amendment encompasses a *narrow* proportionality principle.<sup>204</sup> Justice Kennedy admitted that the precise contours of the principle are "unclear," but concluded that based upon principles established in their prior decisions, criminal sentences do not have to meet a strict requirement of proportionality between the crime committed and the sentence imposed in order to comport with the Eighth Amendment.<sup>205</sup>

### 1. Issue: The Severe Length of the Sentence

Justice Kennedy focused on the fact that Harmelin had committed a drug offense to determine whether, on its face, there was any inference of disproportionality in the severe length of the sentence. He concluded, without extensive analysis, that there was no constitutional disproportionality. His opinion relied on the view that drugs relate to crime in at least three ways: "(1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture."<sup>206</sup> Justice Kennedy asserted that illegal drugs are directly linked to crimes of violence.<sup>207</sup> He noted that studies on violent crime demonstrate this point. Therefore, according to Justice Kennedy, the Michigan legislature could reasonably conclude that because of the link between drugs, violence, crime, and social displacement, the

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<sup>204</sup> *Id.* at 2702 (Kennedy, J., concurring). Justice Kennedy cites the holdings in *Helm, Davis, Rummel*, *Enmund v. Florida*, 458 U.S. 782 (1982), *Coker v. Georgia*, 433 U.S. 584 (1977), and *Weems v. United States*, 217 U.S. 349 (1910).

<sup>205</sup> *Harmelin*, 111 S. Ct. at 2705 (Kennedy, J., concurring). Justice Kennedy offered four "common principles that give content to the uses and limits of proportionality review." First, citing *Rummel*, Justice Kennedy noted that "fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures . . .'" *Id.* Second, "the Eighth Amendment does not mandate adoption of any one penological theory." *Id.* at 2704. "Third, marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure." *Id.* Finally, "proportionality review by federal courts should be informed by 'objective factors to the maximum possible extent.'" *Id.* (quoting *Rummel*, 445 U.S. at 274-75, quoting *Coker*, 433 U.S. at 592 (plurality opinion)).

<sup>206</sup> *Harmelin*, 111 S. Ct. at 2706.

<sup>207</sup> *Id.*

possession of 650 grams of cocaine warranted the deterrence and retribution of a life sentence.<sup>208</sup>

In order to provide future courts with more guidance than provided in *Helm* and further limit appellate review of sentences, Justice Kennedy made a significant pronouncement concerning the *Helm* test. In response to Harmelin's contention that a comparative analysis is due, and that such analysis reveals a disproportionality in his sentence, Justice Kennedy stated that "[g]iven the serious nature of petitioner's crime, no such comparative analysis is necessary."<sup>209</sup> With this "threshold" determination of whether a sentence is "grossly disproportionate," Justice Kennedy weakened *Helm*. This "threshold" disposition eliminates the need to apply the second and third prongs of the *Helm* test. This analysis is in direct conflict with Justice Powell's approach in *Helm*:

[N]o one factor will be dispositive in a given case. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus *no single criterion* can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. But *a combination of objective factors* can make such analysis possible.<sup>210</sup>

Justice Kennedy, however, asserted that this analysis was consistent with the principles established in *Helm*. He noted the above quotation, but concluded that this quotation did not mean that the converse was not true. Indeed, "one factor may be sufficient to determine the constitutionality of a particular sentence."<sup>211</sup>

This approach completely undermines the goals of *Helm*: Justice Powell's attempt to develop a useful objective standard for proportionality review. Justice Kennedy's analysis accomplished exactly the kind of subjective judgment criticized by the *Helm* dissent and *Rummel* majority. He and four

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 2707. Legal analysts noted that the decision in *Helm* did not provide much guidance on how to apply the three objective factors beyond that particular offender and his specific crimes. See Baker & Baldwin, *supra* note 45, at 46. Justice Kennedy adopted the views expressed in an amicus curiae brief. Amici urged that "no proportionality analysis under *Solem v. Helm*, 463 U.S. 277 (1983) is required at all, extended or otherwise, for patently serious offenses involving violence, drugs, and similar crimes, regardless of the characteristics of the offender (e.g., first offender) . . . ." Brief for Amici Curiae, The Washington Legal Foundation et al., at 5. Amici "focus[ed] their *Helm* analysis on the first criterion, especially the gravity of the offense prong, which in our view so far outweighs the other factors as to make this Court's resolution of this case a relatively easy matter." *Id.* at 7.

<sup>210</sup> *Helm*, 463 U.S. at 291 n.17 (emphasis added) (citations omitted).

<sup>211</sup> *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring).

other Justices substituted their individual subjective moral values in place of an objective comparative analysis. The analysis ended before it even began.

Notably missing from the *Harmelin* opinion, when compared to *Rummel*, *Davis*, and *Helm*, is a detailed examination of Harmelin's offense and his criminal history. Justice Kennedy disposed of Harmelin's claims with less contextual consideration than the Court had given in the previous Eighth Amendment proportionality cases.<sup>212</sup> This lack of extended analysis is best understood by noting that Justice Kennedy's focus was more generalized compared to that applied in *Rummel*. His analysis concentrated on how society has suffered due to the "pernicious effects of the drug epidemic."<sup>213</sup> Justice Kennedy undoubtedly believed that the public harm caused by illegal drugs justified a harsh sentence, and thus context was considered less important.

Therefore, Justice Kennedy concluded that the severity of Harmelin's crime brought his sentence within the constitutional boundaries established by the Court's prior decisions.<sup>214</sup>

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<sup>212</sup> See *supra* notes 76-166 and accompanying text. Justice Kennedy was satisfied that prosecutorial discretion and the possibility of executive or legislative clemency was a sufficient safeguard against unjust sentences. He viewed Harmelin's possession of "undiluted cocaine and several other trappings of a drug trafficker" as indicative of Harmelin's deserving the maximum penalty. *Harmelin*, 111 S. Ct. at 2709 (Kennedy, J., concurring).

<sup>213</sup> *Harmelin*, 111 S. Ct. at 2706 (Kennedy, J., concurring). On this point, Justice Kennedy borrowed a quote from Justice Powell. "A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault." *Id.* at 2706 (citing *Rummel*, 445 U.S. 370, 296 n.12 (1982) (Powell, J., dissenting)). Justice Kennedy also cited statistics on the correlation between crime and drugs. For example, he noted that "[i]n Detroit, Michigan in 1988, 68 percent of a sample of male arrestees and 81 percent of a sample of female arrestees tested positive for cocaine. And last year an estimated 60 percent of the homicides in Detroit were drug-related, primarily cocaine-related." *Id.* (citing NATIONAL INSTITUTE OF JUSTICE, 1988 DRUG USE FORECASTING ANNUAL REPORT 4, 7 (Mar. 1990); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EPIDEMIOLOGIC TRENDS IN DRUG ABUSE 107 (Dec. 1990)).

<sup>214</sup> Justice Kennedy compared Harmelin's sentence with the one in *Hutto v. Davis* and found that "a rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which 'no sentence of imprisonment would be disproportionate.'" *Id.* (quoting *Helm*, 463 U.S. at 290 n.15). Justice Kennedy attempted to establish a standard based upon the breadth of the leading proportionality cases from *Rummel* to *Helm*. He noted that *Helm* "did not announce a rigid three-part test" and that *Rummel* and *Davis* did not credit such analysis. *Harmelin*, 111 S. Ct. at 2707. He concluded that "[a] better reading of our cases leads to the conclusion that intra- and inter-jurisdictional analysis are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* But is this really the better reading? All of the decisions were close cases, and the factual distinctions, both in the crimes and the characters of the offenders, raise doubt whether together they stand for anything more than



## 2. Issue: Mandatory Nature of the Sentence

Justice Kennedy also found that the mandatory nature of the sentence is constitutionally acceptable, noting the history of mandatory sentencing in this country.<sup>215</sup> The basis for his opinion is legislative deference. Justice Kennedy stated that “[i]t is beyond question that the legislature ‘has the power to define criminal punishments without giving the courts any sentencing discretion.’”<sup>216</sup> Justice Kennedy, just as Justice Scalia, rejected any notion of expanding the individualized sentencing rules applied in capital cases.<sup>217</sup>

### C. Dissent

In his dissent, Justice White refuted Justice Scalia’s historical argument and his assertion that an objective proportionality analysis is impossible.<sup>218</sup> He also pointed out that by discarding the second and third factors set forth in *Helm*, Justice Kennedy frustrates any attempt to objectively measure the proportionality of criminal sentences.<sup>219</sup> All of the dissenters agreed that the sentence should be overruled applying the *Helm* text.<sup>220</sup>

The dissent’s view can be best summarized by a quotation from Justice White: “While Justice Scalia seeks to deliver a swift death sentence to *Helm*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell.”<sup>221</sup>

## V. APPLICATION OF *HELM* TO *HARMELIN*

The most disturbing aspect of the *Harmelin* opinion is the failure of the Court to completely analyze the disproportionality of the sentence. Justice Scalia scoffed that it is legislative prerogative under a system of federalism to

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that successful proportionality challenges are rare and virtually factbound by sentence and offender. The only case which attempted to provide a standard of review was *Helm*.

<sup>215</sup> *Harmelin*, 111 S. Ct. at 2708. Justice Kennedy also noted the arguments for and against mandatory sentencing. Proponents argue that “broad and unreviewed discretion exercised by sentencing judges leads to the perception that no clear standards are being applied, and that the rule of law is imperiled by sentences imposed for no discernible reason other than the subjective reactions of the sentencing judge.” *Id.* Critics argue, however, that mandatory sentencing deprives judges of the power to make individual determinations of culpability and to consider mitigating facts. *Id.*

<sup>216</sup> *Id.* at 2708 (quoting *Chapman v. United States*, 111 S. Ct. 1919, 1929 (1991)).

<sup>217</sup> *Id.* at 2708–09.

<sup>218</sup> *Id.* at 2710–14 (White, J., dissenting).

<sup>219</sup> *Id.* at 2715.

<sup>220</sup> *Id.* at 2719–20.

<sup>221</sup> *Id.* at 2714.

assign criminal penalties without the interference of the judiciary. And the concurring Justices disposed of Harmelin's arguments on a "threshold" review, concluding that on its face the sentence does not appear unconstitutionally disproportionate.

On the contrary, a sentence of life without parole is "a fact which on its own is perhaps enough to trigger an extended proportionality analysis."<sup>222</sup> When the *Helm* test is applied to the facts in *Harmelin*, one inevitably concludes that the sentence was disproportionately harsh, in violation of the Eighth Amendment.

#### A. Helm Factor One: Gravity of the Offense Compared to the Harshness of the Penalty

Justice Kennedy disposed of Harmelin's challenge with a threshold evaluation that the sentence was not disproportionate given the gravity of the offense. It is clear that "drug offenses are serious crimes."<sup>223</sup> And no one would question that those who engage in serious criminal conduct that contributes to the increase in violence, as drug trafficking surely does, deserve serious punishment. But, as with other criminal offenses, different offenders demonstrate different levels of culpability and blameworthiness. For example, in criminal homicides, "[s]ociety distinguishes between those who acted with and those who acted without a purpose to destroy life."<sup>224</sup> Distinguishing culpability serves important purposes. It provides some safeguard against excessive, disproportionate, or arbitrary punishment and promotes a more just, individualized treatment of offenders.

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<sup>222</sup> *United States v. McCann*, 835 F.2d 1184, 1188 (6th Cir. 1984). *McCann*, like *Harmelin*, involved a challenge to a life sentence that resulted from a drug conviction.

<sup>223</sup> Brief of Petitioner at 7, *Harmelin* (No. 89-7272).

<sup>224</sup> *Id.* at 22; see *Lockett v. Ohio*, 438 U.S. 586 (1978) (stating that individualized sentencing in criminal cases is preferred because definitions of crime generally have not been thought automatically to dictate what should be the proper penalty); see also *Solem v. Helm*, 463 U.S. 277, 293 (1983) ("Most would agree that negligent conduct is less serious than intentional conduct."). Compare *Enmund v. Florida*, 458 U.S. 782 (1982) (reversing the death sentence in a felony murder conviction, the Court stressed the petitioner's lack of intent to kill as determining that he was less culpable than were his accomplices) with *Tison v. Arizona*, 481 U.S. 137, 156, 158 (1987) (upholding the death sentences in the felony murder convictions the Court said, "A critical facet of . . . culpability . . . is the mental state with which the defendant commits the crime . . . . [T]he more purposeful the criminal conduct, . . . the more severely it ought to be punished . . . ." "[M]ajor participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.").

If the Court had focused on the facts of Harmelin's offense, it would have found that Harmelin did not import large quantities of cocaine.<sup>225</sup> There was no evidence presented at trial that he sold any drugs, or that he was a "major player in any drug enterprise."<sup>226</sup> The prosecution did not charge him with drug dealing,<sup>227</sup> rather merely possession. Harmelin did not lead the lavish lifestyle associated with the drug trade.<sup>228</sup> Nonetheless, the Court's limited

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<sup>225</sup> Brief of Petitioner at 30, *Harmelin* (No. 89-7272).

<sup>226</sup> *Id.* at 30. The presentence report described the petitioner as a large-scale drug dealer, estimating the value of the cocaine he was carrying between \$67,000 and \$100,000. This fact was affirmed in the Respondent's brief. *Id.* at 5; Brief of Respondent at 3-4, *Harmelin* (No. 89-7272). But there was also indication that Harmelin may have been a drug addict. Brief of Petitioner at 5, *Harmelin* (No. 89-7272) (citing J.A. presentence report, p.4). Respondent also submitted that Harmelin had admitted in a news article that he had been selling cocaine in quantities of up to a gram six months prior to his arrest. In that article, Harmelin had also stated that he had "agreed as a favor to the supplier to drive the cocaine to an apartment in Detroit." Brief of Respondent at 3-4 (citing *Drug Dealer Fights 'Death in Prison' Term*, THE DETROIT NEWS).

There was no proof offered, however, concerning Harmelin's role in the drug trafficking hierarchy, and nothing that would dispute the fact that he was a "mule of transport." The prosecution, as is often the case, made no attempt to prove intent to distribute because the penalty is the same for possession as well as the more serious (and more difficult to prove) offense of intent to distribute. Because of the mandatory nature of the sentence, the contents of the presentencing report were not challenged nor mentioned at the time of sentencing. Brief of Petitioner at 5, *Harmelin* (No. 89-7272). Thus, there is conflicting evidence concerning Harmelin's role, and naturally his blameworthiness, but the mandatory nature of the sentence made all of these facts irrelevant.

*Cf.* *United States v. McCann*, 835 F.2d 1184 (6th Cir. 1984). In *McCann*, the Sixth Circuit panel applied the *Helm* analysis to a Michigan defendant convicted under a federal drug law, 21 U.S.C. § 848, and sentenced him to life imprisonment without parole. The panel concluded that the sentence of life without parole was extremely harsh. The defendant's crime, however, was also harsh. McCann had been involved in a large, continuing enterprise in drugs and profits. His drug enterprise was extensive and lucrative. The drug enterprise was responsible for *hundreds of kilograms* of cocaine importation, involving several Latin American countries and a substantial number of people. McCann was not merely a "logistics man," but recruited people and supervised the activities of the operation. Further, the panel found that there was no significant disparity when comparing McCann's sentence with others imposed by federal courts in convictions for continuing criminal enterprise. Finally, the panel noted that the defendant would have received the same sentence if he had been tried under state jurisdiction in Michigan. "McCann could have received a mandatory life sentence in Michigan for activities substantially less blameworthy than the hundreds of kilograms of cocaine he was actually responsible for." *McCann*, 835 F.2d at 1190. The Sixth Circuit, thus, upheld the sentence. *Id.* at 1185.

<sup>227</sup> Brief of Petitioner at 5, *Harmelin* (No. 89-7272).

<sup>228</sup> To the contrary, Harmelin's "financial resources were meager," not at all consistent with the image of a "drug kingpin." Brief of Petitioner at 30, *Harmelin* (No. 89-7272). Harmelin was unemployed at the time of the offense. "His assets, apart from the

analysis treated all drug offenders as equal. It failed to distinguish, as do the federal sentencing guidelines and most state statutes, between offenders whose possessions imply a major role in a large drug enterprise and offenders with smaller possessions, which imply a *minor* role in what may (or may not) constitute a large drug enterprise, that is, a low-level street dealer or addict.<sup>229</sup>

If the Court had looked at Harmelin as an individual, it would have discovered why it is unfair to treat all offenders the same without consideration of their individual culpability or potential for rehabilitation. There was no indication that Harmelin could not be rehabilitated. He was not a repeat offender. In fact, he had never been arrested for any crime.<sup>230</sup>

The Court, in essence, affirmed the harshest penalty possible in the state of Michigan, without giving full consideration to the impact such a harsh sentence will have on an offender who may conceivably have deserved less.

The Court should have considered the enormous difference between being sentenced to life without the possibility for parole and being given a lengthy sentence. A lengthy sentence at least allows a prisoner to retain some hope or dreams for the future. "[T]he very fact of having no possibility of release

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drugs, consisted of a nine year old Ford automobile" *Id.* at 5, and "\$597.00 in his pocket." *Id.* at 3. "He resided at an apartment in Detroit" *Id.*. The respondent and amici, however, disputed this characterization and pointed out that Harmelin "retained his attorney for \$15,000," allegedly "paid for by an associate" of his, "according to police investigation." Brief of Respondent at 2, *Harmelin* (No. 89-7272).

<sup>229</sup> Justice Kennedy noted that Michigan's sentencing scheme establishes graduated punishments for offenses involving varying amounts of illegal drugs. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2708 (1991) (Kennedy, J., concurring). However, the minimum amount required for the life imprisonment without parole is only 650 grams. Under federal and other states' laws, a mandatory sentence of life imprisonment without parole does not apply unless the amount is substantially higher. Federal law requires distribution of 150 kilograms of cocaine. Alabama is the only other state with such a harsh penalty, but the minimum amount required is more than 10 kilograms (along with proof of "criminal enterprise"). See Brief of Petitioner at 23-25, *Harmelin* (No. 89-7272). As noted in the arguments for and against the Michigan 650 Lifer law, to avoid the harsh penalties in Michigan, drug kingpins use addicts to transport large quantities of cocaine. Addicts, who need money or drugs to support their addiction are more likely to risk being caught. *Id.*

<sup>230</sup> Brief of Petitioner at 5, *Harmelin* (No. 89-7272). The presentence report revealed that Harmelin had no prior contacts with the criminal justice system *Id.* (citing J.A. presentence report, p.1). Harmelin admitted that he was a drug addict. He denied an addiction to cocaine which was contradicted by the fact that he had four brass cocaine straws and one cocaine spoon in his pocket, as well as a small amount of cocaine *Id.* (citing J.A. presentence report, p.4). The fact that Harmelin was not sentenced as a recidivist is relevant in weighing the punishment he received. In *Rummel*, the Court explained that the state's interest in punishing a recidivist is different than its interest in punishing a first-time offender. See *Rummel v. Estelle*, 445 U.S. 263, 276 (1980).

transforms an endurable punishment into a life shattered beyond all hope.”<sup>231</sup> Thus, it is not simply a difference in degree but also in kind. The possibility of commutation does not lessen the harshness of Harmelin’s sentence. Given the statutory procedures, it is possible to predict generally when parole might be granted. It is impossible to predict if or when commutation will occur.<sup>232</sup>

Life imprisonment without parole is a profoundly harsh sentence. It takes away everything that people hope and dream for in their lives, forever. Such punishments are reserved for the most vile and vicious cruelties.<sup>233</sup> Is such a harsh punishment really appropriate for a nonvicious person who commits a drug offense? The answer is simply no.<sup>234</sup>

Thus, by failing to take into account the facts of this particular offense (as opposed to the general effect of drug trafficking on the nation) or to consider Harmelin’s history or characteristics as an individual, the Court skirted over two important considerations in weighing the gravity of the offense against the harshness of the penalty.<sup>235</sup> In the prior cases of *Rummel*, *Davis*, and *Helm*, the Court found relevant the *nature of the crimes* and *history of the individual defendants*. The Court in *Harmelin* only focused on the abhorrent nature of drug trafficking and its current status as “one of the greatest problems affecting the health and welfare of our population.”<sup>236</sup>

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<sup>231</sup> Brief of Petitioner at 32, *Harmelin* (No. 89–7272).

<sup>232</sup> As noted in *Helm*, “[t]he possibility of commutation is nothing more than a hope for ‘an *ad hoc* exercise of clemency.’ It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment.” *Solem v. Helm*, 463 U.S. 277, 303 (1983). More importantly, former Michigan Governor James Blanchard, in office from December 1990–January 1993, only pardoned one convicted murderer and no drug prisoners. See Brief of Petitioner at 43 n.8, *Harmelin* (No. 89–7272); Michigan Manual, Mich. Legis. Serv. Bureau (1991–92). Furthermore, the present Governor of Michigan, John Engler, has not pardoned any convicted criminals. “Given the climate of hysteria over the war on drugs, [it is unlikely] that an official would risk taking such an action.” Brief of Petitioner at 43 n.8, *Harmelin* (No. 89–7272).

<sup>233</sup> Life imprisonment with no possibility of parole is reserved, in most states, for either first or second degree murder.

<sup>234</sup> Brief of Petitioner at 32–33.

<sup>235</sup> As a result, the Court also missed the importance of Harmelin’s argument urging that a more individualized determination be required when imposing a sentence of life imprisonment without the possibility of parole.

<sup>236</sup> *Harmelin v. Michigan*, 111 S. Ct. 2680, 2705 (1991) (citing *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989)).

B. Helm Factor Two: *Comparison of the Sentence to Those for Other Crimes in Michigan*

The second prong of the proportionality analysis in *Helm* is to compare sentences for other crimes in the same jurisdiction to evaluate whether more serious crimes are subject to the same penalty or to less serious penalties.<sup>237</sup> A punishment, otherwise appropriate, may be so disproportionate to the offense charged as to be cruel and unusual.

The Michigan statute in question imposes a sentence of mandatory life imprisonment with no possibility of parole for mere possession of 650 grams or more of a mixture of cocaine. The penalty is applicable to both the first-time offender and the habitual criminal. Because Michigan has no death penalty, Harmelin's sentence is the harshest punishment that could be imposed by the state on any criminal for any crime. The only other crime that evokes the ultimate punishment in Michigan is first-degree murder, the highest level of culpability for the taking of a life.<sup>238</sup> Thus, the state of Michigan has in effect equated the punishment for a nonviolent offense with that reserved for only "the most culpable murderers . . . so morally depraved[,] . . . considered to be

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<sup>237</sup> *Helm v. Solem*, 463 U.S. 277, 291 (1983).

<sup>238</sup> In general, first-degree murder is defined as deliberate, willful, premeditated, or intentional killing. It represents the highest level of mental culpability for a criminal homicide. See, e.g., MODEL PENAL CODE §§ 210.2-.4; CAL. PENAL CODE § 189 (West Supp. 1993); 18 PA. CONS. STAT. ANN. § 2502 (1983). In Michigan, first-degree murder requires the following:

The government must prove beyond a reasonable doubt that the defendant intended to kill the victim, and that the intent to kill was premeditated, and that the killing was deliberate. Deliberate means that the defendant must have considered the pros and cons of that design and have measured and chosen his actions. The intent must be formed by a mind that is free from undue excitement. This excludes acts done on a sudden impulse without reflection [or as a result of a sudden fight] . . . There must be such a lapse of time as would give the mind time to think about the purpose and intent of the killing . . . .

. . . .

By contrast, for the offense of possession of over 650 grams of cocaine, the government must only prove that the defendant knowingly possessed over 650 grams of a substance containing cocaine.

Brief of Petitioner at 40-41, *Harmelin* (No. 89-7272) (citing Michigan Criminal Jury Instructions 16:2:01).

beyond rehabilitation, . . . [and] the most morally reprehensible.”<sup>239</sup> This act is an anomaly in criminal law.<sup>240</sup>

In contrast, second-degree murder, assault with intent to murder, first-degree criminal sexual conduct, armed robbery, assault with intent to rob while armed, bank robbery, kidnapping, taking of hostages by penal inmates, and being a “fourth habitual felon” carry terms of “life or any term of years.”<sup>241</sup> The Michigan courts have interpreted the phrase “life or any term of years” to mean a mandatory minimum of one year and one day imprisonment.<sup>242</sup> Furthermore, Michigan law provides that a “prisoner under sentence for life or for a term of years, other than a prisoner sentenced for life for murder in the first degree or sentenced for life or for a minimum term of imprisonment for a major controlled substance offense,” is eligible for parole after ten years.<sup>243</sup>

Michigan punishes more serious, violent crimes less severely than a drug offense and reserves the punishment of life imprisonment without parole for only one other crime, first-degree murder. This standard of punishment is sufficient to draw an inference of disproportionality within the Michigan criminal statutory scheme.

### C. Helm Factor Three: Comparison to Punishments for the Same Crime in Other Jurisdictions

The third prong of the proportionality test set forth in *Helm* is a comparison of the sentence imposed for commission of the same crime in other jurisdictions.

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<sup>239</sup> Brief of Petitioner at 40, *Harmelin* (No. 89-7272).

<sup>240</sup> In general, the felony murder doctrine is the only criminal offense which can carry a penalty as serious as that which is typically reserved for intentional killings. A felony murder charge occurs when an attempt or commission of a felony dangerous to life results in a death. See LAFAYE & SCOTT *supra* note 61, § 7.5, at 622-41. Restrictions have been placed on this controversial doctrine. See SANFORD A. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 517-38 (5th ed. 1989). For example, many states require that the felony must be one that is dangerous to life. *Id.* at 517-24. The felony cannot be one that was inherent to the killing. *Id.* at 524-31. The victim cannot be a cofelon. *Id.* at 531-38.

<sup>241</sup> MICH. COMP. LAWS ANN. § 750.317 (West 1991) (second degree murder); § 750.83 (assault with intent to murder); § 750.520b (first degree criminal sexual conduct); § 750.529 (armed robbery); § 750.89 (assault with intent to rob while armed); § 750.531 (bank robbery); § 750.349 (kidnapping); § 750.349a (taking of hostages by penal inmates); § 769.12 (fourth habitual felon) (West Supp. 1993).

<sup>242</sup> *People v. West*, 317 N.W.2d 261, 262 (Mich. Ct. App. 1982); *People v. Harper*, 269 N.W.2d 470, 474-75 (Mich. Ct. App. 1978).

<sup>243</sup> MICH. COMP. LAWS ANN. § 791.234(4) (West Supp. 1993) (known as the “lifer law”).

Michigan is the only state in the country which mandates a sentence of life imprisonment with no possibility of parole for the possession of 650 grams of cocaine. Only Alabama has a similar mandatory sentence of life imprisonment with no parole, but that is for the crime of possession of over ten kilograms of cocaine.<sup>244</sup> In Alabama, Harmelin's crime would have subjected him to a five year mandatory minimum term of imprisonment for the offense of possession of from 500 grams to one kilogram of cocaine.<sup>245</sup>

Eleven states provide a possible sentence of up to life imprisonment for Harmelin's offense. All of these states, however, provide for parole: Connecticut after the defendant serves the minimum sentence; Idaho, parole after ten years; Kansas, parole after fifteen years; Missouri, parole after five years; Montana, mitigating factors considered at sentencing; Nevada, parole after serving the minimum term; New York, parole after serving the minimum term; North Dakota, parole after thirty years less reduction for good time credits; Oklahoma, sentence can be suspended for first time offenders; Rhode Island, departure from the minimum sentence allowed for substantial and compelling reasons; Tennessee, parole after nineteen years; and Texas, parole after twenty years.<sup>246</sup>

A comparison to federal penalties also starkly illustrates the unusual harshness of the Michigan penalty for possession of the quantity of drugs in Harmelin's case. Under Federal Sentencing Guidelines, Harmelin's sentence would barely exceed ten years, including all relevant enhancements.<sup>247</sup> Under federal law, the only possibility of a mandatory minimum sentence of life without parole is under the Continuing Criminal Enterprise Statute (often referred to as the "drug kingpin" statute).<sup>248</sup> In order to convict a person under

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<sup>244</sup> ALA. CODE § 13A-12-231(2)(d) (Supp. 1992) (trafficking).

<sup>245</sup> *Id.* at § 13A-12-231(2)(b).

<sup>246</sup> See CONN. GEN. STAT. ANN. §§ 21a-278(a), 54-125 (West Supp. 1993); IDAHO CODE §§ 37-2732(a)(1)(A), 20-233(a) (1991); KAN. STAT. ANN. § 65-4127 (1990); MO. REV. STAT. § 195.222 (Supp. 1993); MONT. CODE ANN. §§ 50-32-101 to 50-32-405, 45-9-101 (1990); N.Y. PENAL LAW § 220.43 (McKinney 1989); N.D. CENT. CODE §§ 19-03-1-23.101, 12.1-32-01 (Supp. 1993); OKLA. STAT. ANN. tit. 63, § 2-401(a)(1) (Supp. 1993); R.I. GEN. LAWS 21-28-4.01(A)(1) (Supp. 1992); TENN. CODE ANN. § 39-17-416 (Supp. 1991); TEX. HEALTH & SAFETY CODE ANN. § 481.116 (West 1990).

<sup>247</sup> See 21 U.S.C. § 841(b)(1)(A)(2) (1988 & Supp. III 1992) (For a first offender who possessed the same amount of cocaine as Harmelin the maximum penalty would be a term of not less than five or more than forty years in prison). However, under the "toughened" Federal Sentencing Guidelines the sentencing court could add on years if it considered Harmelin "an organizer, leader, manager, or supervisor of a drug operation" and the fact that he was carrying a firearm, coupled with the increased sentence resulting from the organizer provision, would, in the worst-case scenario, have resulted in a maximum sentence of 97 to 121 months. UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL, 2D1.1 (1990).

<sup>248</sup> 21 U.S.C. § 848 (Supp. I 1989).



this statute, she must be an organizer, supervisor, or manager of five or more people; commit a continuing series of violations; and derive substantial resources from the activities; and the organization must have grossed at least ten million dollars per year, or alternatively, distributed 150 kilograms of cocaine.<sup>249</sup>

#### D. Summary

The *Helm* test illustrates, without question, that the Michigan statute as applied to Harmelin is disproportionate. Harmelin's sentence is as harsh as the one overruled in *Helm* and harsher than the sentences sustained in *Rummel* and *Davis*. Harmelin's crime is more serious. But Rummel and Helm were recidivists with at least three prior felony convictions, and Davis had also been previously imprisoned. In contrast, Harmelin was a first-time offender. Thus, the decision in *Harmelin* does not even appear reasonable within the framework of the prior proportionality cases.

The dissent also concluded that Harmelin's sentence was disproportionate. As noted in the next two Parts, the various reasons to reach that conclusion convinced the Michigan Supreme Court to overrule the sentence under its state constitution.

### VI. BEYOND *HELM*: REASONS WHY *HARME LIN* WAS WRONGLY DECIDED

Beyond the fact that the Supreme Court failed to apply the *Helm* test, there are other strong reasons to conclude that *Harmelin* was wrongly decided.

#### A. Public Pressure Resulted in Poorly Reasoned Law

There is a huge amount of public pressure on politicians to solve the drug problem. In Michigan, that public pressure coupled with an increase in drug-related crime and frustration of law enforcement officials resulted in the 650 Lifer law.<sup>250</sup> Not surprisingly, the 650 Lifer law has proven to be a law which

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<sup>249</sup> *Id.*

<sup>250</sup> Proponents of the bill argued that "the state had failed to stem drug traffic because the penalties for drug dealing were not severe enough and law enforcement tools were inadequate." Brief of Petitioner at 9, *Harmelin* (No. 89-7272). In addition, they "argued that the law would have an important deterrent effect on drug trafficking [and] keeping drug dealers off the streets longer would help reduce illicit drug activity." *Id.* at 9. Moreover, proponents argued that "Michigan's pre-1978 penalties of up to 20 years in prison posed little or no deterrent to would-be violaters, with lenient probation and parole policies weakening the threat still further." *Id.*

Opponents argued:

draws criticism within the judiciary as well. One Michigan trial judge, Judge Lippitt of the Oakland County Circuit Court, stated:

Having carefully considered this statute, I have come to the conclusion that this law is the product of emotion, not reason. Politicians, known as legislators, in an effort to respond to community pressure and frustration over a very serious drug problem, rushed to a simple formula, in search of a solution—essentially throwing away the key for life for any and all individuals who shall possess more than 650 grams of cocaine. However mindlessly throwing away the key will neither deter such crime, nor promote justice. Quite the opposite, bad laws, such as the one at issue here, promote disrespect . . . .<sup>251</sup>

More importantly, there is no evidence that the harsh penalty has worked to stem the increase in drug trafficking or to deter potential dealers in the state of Michigan.<sup>252</sup> This lack of evidence is not at all surprising because the

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[m]ajor drug dealers, the intended targets of the legislation, would use addicts to transport large quantities of drugs rather than take the risk of facing long mandatory prison sentences themselves. If this happened, the drug traffic would continue and only addicts, who were already victims of the drug scene, would be faced with long prison sentences. Opponents further argued that severe mandatory sentences were a simplistic approach to the complex problem of illicit drug activity.

*Id.* at 9–10. They pointed to the large size of the state's addict population and the potential for profit from drug trafficking as two factors that would ensure there are new drug dealers to replace the jailed ones, while "the problems which provoke and foster drug addiction remain unaddressed." *Id.* at app. 14. Furthermore, opponents pointed out that there is "no real evidence that severe penalties would serve as a deterrent to crime." *Id.* at 10. Opponents also asserted that a deterrent effect could be better achieved "if the state could ensure certainty of apprehension as well as certainty of punishment." *Id.* at app. 14. "Lastly, the bill could put an intolerable burden on the state's courts and penal institutions." *Id.* at 10 (citing the House Legislative Analysis March 23, 1977).

<sup>251</sup> *Id.* at 11 (quoting *People v. Martin*, No. 86-74706 (Oakland County Cir. Ct. 1987)).

<sup>252</sup> The 650 Lifer law has been in effect since 1978. Yet, in its brief, the Respondent conceded that

[t]oday, the situation appears to be even worse . . . . In urban areas such as Detroit . . . the pathologies related to drug abuse—violent crimes and property crimes, AIDS, crack babies—are most pronounced. Urban murders, many of them drug-related, are likely to reach record numbers this year. In Michigan, an estimated 67,000 persons—7.3 of every 1,000 state residents—use cocaine at least once a week.

Brief of Respondent at 19–20, *Harmelin* (No. 89–7272).

conditions which contribute to drug abuse and the profitability of drug trafficking were not addressed by the statute.<sup>253</sup>

Unfortunately, the United States Supreme Court, just as the Michigan Legislature, listened more closely to the public outcry against drug-related crime and human suffering, rather than evaluating whether the logic and reason behind the sentence as applied to Harmelin was sound. The Respondent and Amici<sup>254</sup> presented persuasive arguments concerning the collateral effects of drug trafficking. Respondent referred to the “crack-exposed 5-year-olds”<sup>255</sup> who started kindergarten suffering from an “array of neurological, emotional and learning problems.”<sup>256</sup> Amici presented an even more heart-wrenching description of the sufferings of “crack babies.”<sup>257</sup> Finally, Amici noted the public demand for harsher penalties to stem the tide of illegal drugs. “[T]hirty-

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<sup>253</sup> The legislative history of the 650 Lifer law reveals that the Department of Public Health did not support the bill as passed. The Office of Substance Abuse Services, within the Department, “believes that the imposition of drastically increased penalties against drug traffickers must be accompanied by serious consideration of expanded treatment and rehabilitation to assure adequate care for addicted persons.” Brief of Petitioner at app. 16, *Harmelin* (No. 89-7272). Other arguments advanced against the bill included assertions that “the strict law enforcement approach to drugs . . . is not only a futile method, but one that ultimately worsens the problem. When one major heroin channel is broken and the supply decreases, the price of heroine increases proportionately, and profitability soars.” *Id.* at app. 14.

<sup>254</sup> The United States Government, National District Attorneys Association, Washington Legal Foundation, Citizens for Law and Order, Families and Friends of Missing Persons and Violent Crime Victims, Maryland Coalition Against Crime, Parents Association to Neutralize Drug and Alcohol Abuse, and the Stephanie Roper Committee, Inc.

<sup>255</sup> Brief of Respondent at 20, *Harmelin* (No. 89-7272).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

“[C]rack babies” suffer from a number of birth defects, including deformations such as missing extremities (usually fingers), deformed sex organs and prune belly syndrome. A very high number of cocaine-addicted infants also suffer from abnormally low birth weight (the leading cause of infant mortality), meconium aspiration (a fetus’s ingestion of its own bodily wastes), and repeated seizures. In addition to numerous cases of permanent and severe brain damage, most crack babies typically suffer from small head circumference, restricting the space in which the brain may normally develop . . . [A] large number of these children die. Many of those that do survive will live out their lives severely handicapped as a result of their mothers’ use of cocaine.

Brief of Amici Curiae, The Washington Legal Foundation et al., at 12-13 (footnote omitted).

eight percent of the public believes that convicted drug dealers not guilty of a specific murder should be subject to the death penalty."<sup>258</sup>

However, instead of adding up to a compelling argument for affirming the tough mandatory life sentence, this evidence more convincingly illustrates that the source of the Supreme Court's decision was probably not sound constitutional analysis nor careful consideration of the constitutionally guaranteed rights under the Eighth Amendment. Rather, the Court weighed the public's justified fear of drug crime against an individual's rights to a sentence rationally supported by modern objectives of criminal punishment and decided that the latter was less important than the former. In weighing individual constitutionally guaranteed rights, however, the Supreme Court should, generally, give more deference to the right afforded to the individual rather than to society's concerns. History has proven that society often reacts irrationally to both real and perceived threats.<sup>259</sup>

### *B. First-Time Offenders Punished Unduly Harshly*

Harmelin, a first-time offender, was by statutory mandate, sentenced to the harshest penalty possible in the state of Michigan. The trial judge could not evaluate Harmelin as an individual, or judge and examine any positive accomplishments in his life. The trial judge was also unable to take into consideration the circumstances of the crime, including the lack of evidence as to any violent behavior by Harmelin, or the possibility that Harmelin could be rehabilitated.<sup>260</sup> A law that was designed to target drug kingpins has resulted in

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<sup>258</sup> Brief of Amici Curiae, *The Washington Legal Foundation et al.*, at 13. Amici noted:

The scourge of illegal narcotics has turned America's major cities into a free-fire zone. Drug dealers' wars, fought with AK-47s, Uzis, 9mm Berettas, and the .38 caliber revolvers like the one that [Harmelin] carried, cause thousands of homicides each year . . . . [T]he number of persons believing that drug abuse is the most serious problem our nation faces has grown from two percent in 1985 to twenty-seven percent in 1989.

*Id.* at 11, 13-14.

<sup>259</sup> This country's history attests to this very fact. The "Great Red Scare" of the 1920s and the prosecution of communists under the Smith Act during the post-World War II Cold War era most notably come to mind. The general fear of communism which gripped this nation led to the persecution of individuals for certain types of speech and associations with communists, both of which arguably should have been protected by the First Amendment. See *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>260</sup> Brief of Petitioner at 5, *Harmelin* (No. 89-7272).

the conviction and harsh sentencing of low-level, first-time offenders. "[T]he majority of the 650 Lifers are first-time offenders,"<sup>261</sup> approximately 130 overall, with "[m]ore than fifty percent [acting as] mere accessories—lookouts, drivers, couriers."<sup>262</sup> Thus, the law's stated purpose has not been achieved.

The Supreme Court should have more thoroughly considered the real consequences of this statute. Mandatory life imprisonment without parole is second only to the death penalty in its complete and permanent deprivation of fundamental liberties. In his dissent in *Harmelin*, Justice Stevens pointed out that

a mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished 'criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.' . . . No jurisdiction except Michigan has concluded that [a first-time drug] offense belongs in a category where reform and rehabilitation are considered totally unattainable.<sup>263</sup>

Mandatory life sentences have created appalling conditions in prisons today. Prisons are overcrowded and plagued by the spread of diseases and inadequate health care for the prison population.<sup>264</sup> Prisons are marred by

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<sup>261</sup> *Id.*

<sup>262</sup> Sager, *supra* note 11, at 82.

<sup>263</sup> *Harmelin v. Michigan*, 111 S. Ct. 2680, 2719, 2720 (1991) (Stevens, J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (Stewart, J., concurring)).

<sup>264</sup> See Sandra G. Boodman, *Prison Medical Crisis: Overcrowding Created by the War on Drugs Poses a Public Health Emergency*, WASH. POST, July 7, 1992, at Z5 ("The war on drugs has led to an unprecedented growth in the nation's prison population, straining medical services in many institutions, which are being swamped by inmates with tuberculosis and other life-threatening diseases."). The article further reported that multiple "inmates are routinely confined to cells built to accommodate one person[, which] makes prisons ideal breeding grounds for potentially lethal diseases such as AIDS . . . ." *Id.*; see also Dennis Cauchon, "Lock'em up" Policy Under Attack: Drug Arrests Put Prisons in a Pinch, U.S.A. TODAY, Sept. 1, 1992, at 4a ("Since [1980], the nation's prison and jail population has grown from 513,809 to 1,248,011 in 1991. Experts say the growth will continue in the 1990s because of the drug war, long mandatory drug sentences and cutbacks in parole . . . . Drug arrests grew from 471,165 in 1980 to 1,089,500 in 1991."); Jonathan Marshall, *How Our War on Drugs Shattered the Cities*, WASH. POST, May 17, 1992, at C1 ("The number of Americans behind bars exploded more than 130 percent between 1980 and 1990 . . . . The billions spent to target drug offenders explain much of this dizzy growth." At the state level, "mandatory sentencing laws [have] clogged prisons with drug

violence, and mandatory sentencing laws have prevented the utilization of alternative programs.<sup>265</sup>

Thus, the conditions of prisons today make a mandatory life sentence extremely cruel when meted out without careful consideration. To condemn a person to live out the rest of his or her life in such conditions without consideration for the individual's history, the culpability in the offense, and the propensity for future criminal activity violates modern standards of decency.

Furthermore, lifetime incarceration of individuals who probably can be rehabilitated only further burdens an already overwhelmed prison system. Individuals who have committed far more violent and horrendous crimes get released to make room for those convicted of nonviolent drug offenses.<sup>266</sup> Michigan's statute has resulted in numerous first-time offenders, who are in some cases very young, being totally deprived of any chance of ever living a productive life.<sup>267</sup> For example, there is the case of Gary Wayne Fannon, an eighteen-year-old first-time offender, also convicted under this same Michigan law.<sup>268</sup>

Gary Wayne Fannon was eighteen years old when he was sentenced to serve a life term of imprisonment under the Michigan 650 Lifer law. Barely out of high school, Fannon was targeted for an undercover "sting" operation after

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users and peddlers . . . For some minorities, these trends have had a truly devastating impact.").

<sup>265</sup> Jay Romano, *The Struggle to Ease Jail Overcrowding*, N.Y. TIMES, May 3, 1992, § 13NJ, at 1 ("[T]o relieve the overcrowding, correction officials are looking to such sentencing alternatives as weekends in prison, and community service, and to work-release and home-confinement programs for inmates.").

<sup>266</sup> "New Attorney General Janet Reno questions the wisdom of the federal policy of locking up a drug addict for a mandatory five to ten years in prison, while a violent criminal gets off because of lack of space." *Reno Urges Treatment for Offenders*, THE CINCINNATI ENQUIRER, May 10, 1993, at A7; see also Bruce Frankel and Dennis Cauchon, *Judicial Revolt Over Sentencing Picks up Steam*, U.S.A. TODAY, May 3, 1993, at 9 (explaining that a growing number of federal judges refuse to impose the harsh drug sentences); Steve Gerstel, *Drug Use Parallels Creation of Marginal Americans*, UPI, Mar. 24, 1992, available in LEXIS, Nexis Library, UPI file. (Charles Rangel, D-N.Y., Chairman of the Select Committee on Narcotics Abuse and Control, criticized law enforcement efforts to stem the tide of illegal drug use. "[O]ur response has been to fill our prisons with nonviolent offenders [under mandatory sentences]—who, in many instances, need treatment, education and rehabilitation more than prison bars. Their presence deprives us the use of existing cells to house more dangerous and violent criminals.").

<sup>267</sup> In the case that the Michigan Supreme Court reversed the sentences for mere possession, the defendant, Ruth Bullock, was a first-time offender. Her only prior convictions were three misdemeanors in 1960. *People v. Bullock*, 485 N.W.2d 866, 867 (Mich. 1992).

<sup>268</sup> *People v. Fannon*, 491 N.W.2d 817 (Mich. 1992).

a shooting incident resulted in the arrest of a policeman's son.<sup>269</sup> The officer's son introduced Fannon to a "friend" who wanted to buy some marijuana. Fannon sold it to him. Later the friend wanted to buy a gram of cocaine. Fannon told him he really didn't deal in coke[, but] he'd see what he could do."<sup>270</sup> Fannon later sold him the cocaine. After selling the cocaine for weeks, Fannon himself became a regular user.<sup>271</sup> Finally, his new friend said he wanted to buy a kilogram of cocaine. Fannon claims he was getting scared about this time, and had decided to go off to Florida with his girlfriend to visit his grandmother, but before he left he had arranged for a middleman to make a sale to the friend—an undercover police officer.<sup>272</sup>

Fannon was later arrested in Florida and subsequently convicted of "conspiracy to deliver" more than 650 grams of cocaine. The sentencing judge informed him of his sentence:

I have a stack of letters received from your family members. There must be 25 letters here. They are all glowing as to you and how good a person that you are and what a nice family you have. The court believes all these things. [But] this court has no discretion to give you any leniency. The legislators have determined that the seriousness of this charge, if there is a conviction, mandates life imprisonment . . . . [I]t is the sentence of this court that you be committed to the State Department of Corrections for a period of your natural life.<sup>273</sup>

Fannon sobbed and his thirty-six-year-old mother fainted as the marshal took him away.<sup>274</sup> He turned recently twenty-five years old, but still has no idea if he will ever be released. He admitted he made a mistake, but cannot understand why he had to forfeit the rest of his life for it.

The punishment should fit the crime . . . . I was headed in the wrong direction. But now I got the idea: don't sell drugs. Don't do drugs. Don't be stupid . . . . But this, I mean . . . people don't get it when they hear "life without parole." I'm here until I die.

It's kind of like overkill, you know?<sup>275</sup>

Fannon remains in prison, his appeals have all been denied.<sup>276</sup>

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<sup>269</sup> Sager, *supra* note 11, at 27, 30, 82.

<sup>270</sup> *Id.* at 30.

<sup>271</sup> Fannon claims to have tried it with the undercover officer, which the undercover officer denies. *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *People v. Fannon*, No. 87-0982, slip op. at 10-13 (Recorder's Court, Mich. July 22, 1987).

<sup>274</sup> Sager, *supra* note 11, at 27.

<sup>275</sup> *Id.*

Unfortunately, Gary Fannon's story is not unique.

Though these laws were enacted to catch major drug kingpins, they have been used instead to snare many who fit the language and the letter, but not the intent or the spirit of the statutes. Michigan state representative William R. Bryant, Jr. stated: "In a sense we knew we were enacting a cruel or unusual sentence, but it was intended only for kingpins. We knew it would not be fair to some who could come under its language, but we hoped that the inevitable discretion of the police and prosecutors would limit its use. Our hope was not realized."<sup>277</sup>

## VII. ASSESSING THE CONSEQUENCES

### A. Lower Courts' Proportionality Review

Reversing Harmelin's sentence would not have meant declaring the Michigan statute unconstitutional or opening the floodgates of proportionality review cases. The *Helm* decision did not sound a death knell to recidivist statutes. They still exist today in many states and are constitutionally enforceable. There has not been a flood of reversals of sentences, as the dissenters in *Helm* feared. On the contrary, after *Helm*, lower federal courts applied proportionality review narrowly, as *Helm* urged.<sup>278</sup> There has been only a handful of sentences rendered by state courts overturned as "grossly disproportionate" under *Helm*.

So what effect did this further narrowing have on proportionality review? A brief examination of the lower federal court decisions before and after *Harmelin* sheds some light on this question.

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<sup>276</sup> *People v. Fannon*, 491 N.W.2d 817 (Mich. 1992).

<sup>277</sup> Sager, *supra* note 11, at 82. The Fannon article mentioned the fact that the majority of those sentenced to life under this law are first-time offenders whose culpability under discretionary sentences may have garnered a reduction in sentence. Another example is Ruth Bullock, a 48-year-old grandmother who had never been convicted of any serious crime and had held a steady job as an auto worker for 16 years. She picked up someone at the airport who was carrying more than 650 grams of cocaine and was subsequently sentenced to life imprisonment. *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992).

<sup>278</sup> Justice Powell specifically stated that the Court did not "adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court." *Helm v. Solem*, 463 U.S. 277, 290 n.16 (1983). He further stated that "the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." *Id.*



### 1. *Before Harmelin*

Contrary to the prediction of the dissenters in *Helm*, there has not been a flood of proportionality review cases or reversals of criminal sentences. "Instead, courts have demonstrated that they are 'capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy.'"<sup>279</sup> Only four of the state cases cited in *Harmelin* were reversed on the basis of the *Helm* proportionality analysis.<sup>280</sup> In *Clowers v. State*<sup>281</sup> the Mississippi Supreme Court held that a trial court had discretion to reduce a mandatory sentence of fifteen years without parole under a recidivist statute for a defendant who uttered a forged check.<sup>282</sup> Also, in *Naovarath v. State*,<sup>283</sup> the court relied on both state and federal constitutions to overturn a sentence of life without parole imposed on an adolescent who killed and then robbed an individual who had repeatedly molested him.

There have not been any reported federal cases in which a sentence was overruled as disproportionate based upon *Helm*. On the contrary, the federal courts have been interpreting "grossly disproportionate" as a very narrow category. For example, in *Young v. Miller*<sup>284</sup> the Sixth Circuit upheld a mandatory life term under the Michigan 650 Lifer law for a first offender convicted of possession with intent to deliver more than 650 grams of heroin. The defendant possessed approximately 1300 grams of heroin. The Sixth Circuit concluded that because of the severity of her crime (possessing twice the legal limit), her sentence did not warrant reversal.<sup>285</sup>

Thus, the federal courts have not been inclined to reverse sentences based upon *Helm*, but have interpreted "grossly disproportionate" as being a difficult standard to meet under the objective comparative analysis set forth in *Helm*.

### 2. *After Harmelin*

There have not been any reported cases of sentences overturned under proportionality review since *Harmelin*, although federal challenges have still been undertaken. The federal courts have cited *Harmelin* as the controlling precedent in disposing of such challenges. "A recent decision by the Supreme

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<sup>279</sup> *Harmelin v. Michigan*, 111 S. Ct. 2680, 2713 (1991) (White, J., dissenting) (quoting *Rummel v. Estelle*, 445 U.S. 263, 306 (1980)).

<sup>280</sup> *Id.* at 2713 n.2 (White, J., dissenting).

<sup>281</sup> 522 So. 2d 762 (Miss. 1988).

<sup>282</sup> See also *Ashley v. State*, 538 So. 2d 1181 (Miss. 1989).

<sup>283</sup> 779 P.2d 944 (Nev. 1989).

<sup>284</sup> 883 F.2d 1276 (6th Cir. 1989).

<sup>285</sup> *Id.*

Court has settled this issue definitively.”<sup>286</sup> Furthermore, the *Harmelin* decision has meant that drug cases do not receive extended analysis. They automatically carry a presumption of proportionality no matter how severe compared to the offense. Thus, harsh mandatory drug sentences will remain in force in spite of their drawbacks. They are more likely to be upheld and, therefore, more likely to be sought by prosecutors.

### B. *The Michigan Supreme Court Overturns 650 Lifer Sentences*

The Michigan Supreme Court recently reversed the sentences of persons convicted of simple possession under the 650 Lifer law. The court held that the sentences were disproportionate to the crime under the state constitutional provision against “cruel or unusual” punishments.<sup>287</sup> Although the Michigan Constitution bears no express proportionality requirement, Michigan cases interpreted the ban on cruel or unusual punishments to include disproportionate sentences.

In overruling the sentences for offenders convicted of simple possession, the court noted that it has “followed an approach more consistent with the reasoning of the *Harmelin* dissenters than with that of the *Harmelin* majority.”<sup>288</sup> In fact, the court in *People v. Lorentzen* had used the three-pronged test later adopted by the Supreme Court in *Helm*.<sup>289</sup>

The Michigan Supreme Court stated: “while *Harmelin* is binding and authoritative for purposes of applying the United States Constitution, it is only persuasive authority for purposes of this court’s interpretation of the Michigan Constitution.”<sup>290</sup> Therefore, the court relied on its own precedent and the reasoning of the dissenting justices in *Harmelin*<sup>291</sup> and applied the *Helm/Lorentzen* test. The court acknowledged the gravity of the offense, however, and it also observed that “conviction of the crime involved here does not require any proof that the defendant committed, aided, intended, or even

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<sup>286</sup> *United States v. Kramer*, 955 F.2d 479, 488 (7th Cir. 1992); *see also* *United States v. Lowden*, 955 F.2d 128 (1st Cir. 1992); *United States v. Torres*, 941 F.2d 124 (2d Cir. 1991); *United States v. Hopper*, 941 F.2d 419 (6th Cir. 1991); *Sepulveda v. United States*, 787 F. Supp. 24 (D. Puerto Rico 1992).

<sup>287</sup> *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992) (two cases consolidated).

<sup>288</sup> *Id.* at 873. The court cited *People v. Lorentzen*, 194 N.W.2d 827 (Mich. 1972), which struck down under the Eighth Amendment and MICH. CONST. art. 1, § 16 a mandatory minimum sentence of 20 years in prison for selling any amount of marijuana.

<sup>289</sup> *Bullock*, 485 N.W.2d at 873.

<sup>290</sup> *Id.* at 870.

<sup>291</sup> *Id.* The court disregarded the divided decision in favor of its own precedents, refusing to “reflexively follow the latest turn in the United States Supreme Court’s Eighth Amendment analysis.” *Id.* at 874. “It is unclear, in the wake of *Harmelin* whether . . . *Solem*’s analysis survives as a matter of federal constitutional law . . . .” *Id.* at 873.

contemplated any loss of life or other violent crime . . . .”<sup>292</sup> The court further concluded that

it would be profoundly unfair to impute full personal responsibility and moral guilt to defendants for any and all collateral acts, unintended by them, which might have been later committed by others in connection with the seized cocaine. Persons who independently commit violent and other crimes in connection with illegal drugs can and should be held individually responsible by our criminal justice system.<sup>293</sup>

Therefore, the Michigan Supreme Court found that the sentence was unconstitutional as applied to offenders convicted of simple possession.

However, the Michigan Supreme Court’s decision reaches only those convicted for simple possession. Their sentences were reduced to life with eligibility for parole after ten years. The intent-to-distribute-and-deliver offenders such as Gary Fannon remain sentenced to life imprisonment with no parole.<sup>294</sup>

### VIII. CONCLUSION

Modern concepts of penology and evolved standards of decency warrant the expectation that the punishment should fit the particular offender and the particular crime.<sup>295</sup> Even today, however, punishments exist that should be barred by the Eighth Amendment. The Supreme Court must ultimately determine whether some criminal sentences are so cruel and unusual that they violate the Constitution. Thus, the Supreme Court must conduct proportionality review.

The Supreme Court has struggled in this area. It has historically intervened with caution and shown considerable deference to the states. But the Court must maintain its proper role.<sup>296</sup> When a statute does not conform to “basic concepts of human dignity or clear constitutional commands,

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<sup>292</sup> *Id.* at 876.

<sup>293</sup> *Id.*

<sup>294</sup> A dissenting Justice in the Fannon appeal to the Michigan Supreme Court stated the court should hear arguments on the intent and delivery cases. He further stated that prosecutors may have charged possession out of convenience because the penalty was the same, and thus some caught with possession of more than 650 grams of cocaine could be “charge[d] up” to the harsher penalty if the prosecution argued that such a large quantity inferred an intent to deliver. *People v. Fannon*, 491 N.W.2d 817, 821 (Mich. 1992) (Levin, J., dissenting).

<sup>295</sup> *Baker & Baldwin*, *supra* note 45, at 73.

<sup>296</sup> *Id.*

the Court's duty, and not its discretion, is invoked."<sup>297</sup> Furthermore, in fulfilling its duty, the Court must not haphazardly conduct its analysis; ignoring important considerations in favor of more politically popular concerns.

The decision in *Harmelin v. Michigan* has had and will continue to have a chilling effect on constitutional challenges based upon the Eighth Amendment proportionality principle. In upholding such a harsh sentence without consideration of the individual offender, the Court upheld a punishment obviously devoid of legitimate penological objectives. The Court based its decision upon the general threat to society drug offenses pose rather than any actual threat Harmelin posed. Clearly the catalyst behind the decision was the popular sentiment concerning the harmful impact of illegal drugs on American society and Americans' loathing of individuals who perpetrate this scourge. Hence, the Court abdicated its role as the final arbiter of constitutional rights and set aside the concepts of justice and fairness in favor of the more popular decision, a decision which affirmed an impingement upon basic civil liberties.

Mitigating the impact is the divisiveness within the Court. The majority concurred only in the decision and in Part IV of the plurality opinion. The potential for a more thoughtful United States Supreme Court proportionality review remains.

Ultimately, the *Harmelin* decision will more severely limit the United States Supreme Court's already limited proportionality review to only the *most* compelling cases. It is a functionally more narrow definition of proportionality. Only "grossly disproportionate" sentences—under *Harmelin* rather than *Helm*—will be considered unconstitutional, and the concurring Justices indicated that such a determination can be in some cases made at the threshold level, without *Helm*'s complete three-part analysis. In other rare cases, the analysis established in *Helm* may be applied. Mandatory life sentences in drug cases, regardless of the offender's actual blameworthiness, have a "constitutional stamp of approval."<sup>298</sup>

Whether the Court hears another case challenging a criminal sentence will depend on how the federal courts continue to interpret *Harmelin*. A change in Justices—forming a pro-*Helm* majority—and an undeniably compelling case would present a perfect scenario for restoration of the *Helm* principles. However, this scenario is not likely to happen in the next few years. The pro-*Rummel* forces have already gained a likely vote with Justice Clarence Thomas,<sup>299</sup> who replaced the late Justice Thurgood Marshall, a *Helm* supporter. Thus, it is likely that the current Court would reach a similar result.

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<sup>297</sup> *Id.*

<sup>298</sup> Ruth Marcus, *High Court Upholds Life Sentence in Drug Case: Mandatory Michigan Penalty Imposed for Possession of 1 1/2 Pounds of Cocaine*, WASH. POST, June 28, 1991, at A16.

<sup>299</sup> Justice Thomas has urged narrow interpretation of the Eighth Amendment protection in other cases. See *Hudson v. McMillian*, 112 S. Ct. 995, 1010 (1992) (Thomas,

Unfortunately, the present United States Supreme Court has displayed the tendency to succumb to popular pressures described by Oliver Wendell Holmes:

Great cases, like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.<sup>300</sup>

Undoubtedly, future legal analysts will look back at the war on drugs as a time when Holmes's words were particularly applicable.<sup>301</sup>

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J., dissenting) (suggesting that the Court's ruling was a "manifestation of the pervasive view that the Federal Constitution must address all ills in our society").

<sup>300</sup> Northern Secs. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

<sup>301</sup> Baum, *supra* note 1, at 887. While drug cases flood the courts, the Supreme Court has steadily eroded the constitutional protections against police and legislative excess. For example,

[t]he court during the past decade let police obtain search warrants on the strength of anonymous tips (Fourth and Sixth Amendments). It did away with the need for warrants when police want to search luggage, trash cans, car interiors, bus passengers, fenced private property and barns (Fourth). It let prosecutors hold drug offenders without bail (Eighth). It permitted the confiscation of property before a suspect is charged, let alone convicted (Fifth) . . . . It allowed the seizure of defense attorneys' legal fees in drug cases (Sixth).

*Id.* at 889.

